(6)

No. 91-615

In The

Supreme Court of the United States

October Term, 1991

ALLIED-SIGNAL, INC., as successor-in-interest to The Bendix Corporation,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Writ Of Certiorari
To The Supreme Court
Of New Jersey

BRIEF FOR RESPONDENT ON REARGUMENT

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QUESTIONS PRESENTED

1. Should the Court overrule *ASARCO Inc. v. Idaho State Tax Commission*, 458 *U.S.* 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 458 *U.S.* 354 (1982)?

2. If *ASARCO* and *Woolworth* were overruled, should the decision apply retroactively?

3. If *ASARCO* and *Woolworth* were overruled, what constitutional principles should govern state taxation of corporations doing business in several states?

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SUMMARY OF ARGUMENT

Although we argued in our initial brief that the Court could decide this case in New Jersey's favor without overruling *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 *U.S.* 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 458 *U.S.* 354 (1982), if the Court wishes to clear up the confusion spawned by those decisions and establish a clear, sensible rule for the future, it should overrule them. *ASARCO* and *Woolworth* are weakly reasoned, inconsistent with common experience, and have proved to be unworkable in the lower courts. *Payne v. Tennessee*, 111 S.Ct. 2597 (1991).

The two decisions are weakly reasoned because they lose sight of what the Due Process Clause requires. As interpreted in *Miller Bros. Co. v. Maryland*, 347 *U.S.* 340, 344-45 (1954), the Clause requires that the person, property, or transaction that the state seeks to tax be within its borders. When a multistate corporation is doing business in the taxing state, that corporation is within the state's borders for tax purposes, *Mobil Oil Corp. v. Comm'r of Taxes*, 445 *U.S.* 425, 437 (1980), and when the income of a single corporation is the measure of the tax, the Due Process Clause does not require a nexus between the state and other taxpayers or other taxpayers' income. *Wisconsin v. J.C. Penney Co.*, 311 *U.S.* 435, 445 (1940). *ASARCO* and *Woolworth*, by requiring an operating relationship between the payor and payee of investment income, unjustifiably impose an extra nexus requirement – a connection with a separate taxpayer and its income. Neither the long line of cases testing state taxes under the Due Process Clause nor the unitary business cases preceding

and subsequent to *ASARCO* and *Woolworth* require such double nexus.

Further, as we suggested in our initial brief (Rb36), *ASARCO* and *Woolworth* have no relation to common experience, in particular, economic reality, a guideline in the state taxation field that the Court has recognized since its decision in *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* 274 (1977); *Trinova Corp. v. Michigan Dep't of Treasury*, 111 *S.Ct.* 818, 828 (1991). Corporate investing is on a continuum. The line between operational and passive intangibles cannot be drawn with precision. Neither the accounting profession nor the business community can say with certitude where one leaves off and the other begins.

Moreover, *ASARCO* and *Woolworth* have spawned continuing litigation and incoherent, inconsistent results as lower courts search for operating relationships between payor and payee when they think the facts are similar to those in *ASARCO* and *Woolworth*, but look for the integration of an investment with the taxpayer's operations when dealing with short-term investments.

If *ASARCO* and *Woolworth* are overruled, the decision should be retroactive under *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971). While all the views espoused in *James B. Beam Distilling Co. v. Georgia*, 111 *S.Ct.* 2439 (1991), and in *American Trucking Ass'ns v. Smith*, 110 *S.Ct.* 2323 (1990), point to retroactive overruling here, we believe that the *Chevron Oil* test is the appropriate one because it allows for purely prospective overruling in exceptional cases to protect the reliance interests of those affected by the overruling decision.

In this case, petitioner cannot meet *Chevron Oil*'s three-part test for prospective overruling. First, the overruling of *ASARCO* and *Woolworth* would not establish a new principle of law within the meaning of *Chevron Oil*. *ASARCO* and *Woolworth* were never the kind of "clear precedent" that *Chevron Oil* contemplates, and, once the Court decided *Container Corp. v. Franchise Tax Bd.*, 463 *U.S.* 159 (1983), the precedent established by those decisions was even less clear. Moreover, Bendix cannot have relied on the two decisions when it sold its stock in ASARCO because the stock sale took place before the decisions were issued. Second, prospective application would not further the new rule (assuming there were one) because, despite a more relaxed nexus standard, New Jersey would be exposed to a substantial loss of tax revenue in pending assessment and refund cases and additional refund claims. Third, the equities do not favor prospective overruling. Bendix should have known that *ASARCO* and *Woolworth* were suspect as soon as the Court issued its decision in *Container*, 463 *U.S.* 159 (1983), because the Court made clear in that case that the factors deemed essential in *ASARCO* and *Woolworth* to the existence of a unitary business – operating control and substantial flows of product – were not required after all. *Container*, 463 *U.S.* at 178-179.

If *ASARCO* and *Woolworth* are overruled, the Court should construe the Due Process Clause to permit a nondomiciliary state to tax on an apportioned basis all the net income of a single corporate entity doing business within its borders. Nexus would be established by the corporation's presence in the taxing state. *Mobil*, 445 *U.S.* at 437. Since only that corporation would be subjected to

tax and only that corporation's income would be included in the tax base, there would be no requirement of a separate nexus with particular streams of income or with other taxpayers.

On the other hand, where, as in a combined report, income of separate corporations is included in the tax base and the taxing state has no necessary contact with those other corporations, the Court should construe the Clause to require a nexus with the separate streams of income. This nexus would be formed by unitary links between the separate corporate entities as described in *Container, Id.*

The proposed principle would not require the overruling of the Court's unitary business cases preceding or subsequent to *ASARCO* and *Woolworth* and would permit variations in states that do not choose to extend their taxing power as far as the proposed principle would allow. None of the Court's earlier unitary business cases posited an exclusive test of operating relationships between payor and payee, and cases subsequent to *ASARCO* and *Woolworth* have confirmed the impossibility of segregating from the unitary business particular streams of income and site-specific costs. *See e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 490 *U.S.* 66 (1989). A rule permitting less expansive interpretations of the Due Process Clause would be consistent with the Court's repeated admonition that it will not impose a single, uniform apportionment rule on the states, *Moorman Mfg. Co. v. Bair*, 437 *U.S.* 267, 279 (1978), and with its recognition in *Container* that the unitary business principle is not itself unitary. *Container*, 463 *U.S.* at 167. Thus, the states that distinguish between apportionable business income

and allocable nonbusiness income could continue to operate under their present statutory schemes.

Division of the tax base would continue to be tested under the fair relation requirement of the Due Process Clause and the fair apportionment standard of the Commerce Clause. *Container*, 463 *U.S.* at 169. In making that determination, the guiding principle should be the economic reality and practical effect of the tax in relation to the manner in which a multistate corporation is taxed throughout the Nation. A determination whether the apportionment formula should be adjusted on account of the inclusion of intangible income in the base should await the development of an adequate record. That record does not exist here because Bendix presented no facts below to suggest that the apportionment formula operated unfairly and has conceded the issue in this Court.

While inclusion of investment income in the preapportionment tax base would increase the risk of double taxation, that risk exists in the present system and is constitutionally acceptable under *Moorman*, *Mobil* and *Container*. In order to prohibit double taxation, the Court would have to determine which of two states' taxing schemes should take precedence, a course it has not pursued when each state has a legitimate claim to tax a share of a multistate taxpayer's income. *Mobil*, 445 *U.S.* at 446.

The proposed principle would be clear and predictable and thus easy for lower courts to apply, consistent with economic reality, and not subject to manipulation. *See Arkansas Best Corp. v. Commissioner*, 485 *U.S.* 212, 222-23 (1988).

ARGUMENT

POINT I

ASARCO AND *WOOLWORTH* SHOULD BE OVERRULED BECAUSE THEY WERE BADLY REASONED, HAVE NO RELATION TO ECONOMIC REALITY, AND HAVE PRODUCED INCOHERENT, INCONSISTENT RESULTS IN THE LOWER COURTS.

Stare decisis is often preferred because it furthers predictability and confidence in the judicial system. *Payne v. Tennessee,* 111 *S.Ct.* at 2609 (1991). It is not, however, an "inexorable command," giving way to "the lessons of experience and the force of better reasoning . . . " *Burnet v. Coronado Oil & Gas Co.,* 285 *U.S.* 393, 405, 407-08 (1932) (Brandeis, J., dissenting). Particularly in constitutional cases, "where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." *Id.* at 407; *Payne,* 111 *S.Ct.* at 2610. Whether framed in terms of a conviction that the prior decision "is egregiously wrong," *Payne,* 111 *S.Ct.* at 2613 (Scalia, J., concurring), "special justification," *id.* at 2618 (Souter, J., concurring) or "articulable reasons," *Vasquez v. Hillery,* 474 *U.S.* 254, 266 (1986), the factors included in a decision to overrule include "the need 'to bring [a decision] into agreement with experience and with facts newly ascertained,' . . . a showing that a particular precedent has become a 'detriment to coherence and consistency in the law,' " *Payne,* 111 *S.Ct.* at 2621-22 (Marshall, J., dissenting), and the perception that a prior precedent is unworkable or badly reasoned. *Id.* at 2609. When such

conditions coalesce, the Court has not hesitated to overrule its prior decisions.[1]

A. *ASARCO* and *Woolworth* Are Not Well Reasoned.

ASARCO and *Woolworth* are clear candidates for overruling. To begin with, they are poorly reasoned. As pointed out in New Jersey's initial brief (Rb45-46), *ASARCO's* requirement of an operational link between the payor and payee of investment income makes no sense because the tax is being imposed on the payee's investment income in the hands of the payee. What the payor does and how it is related in an operational sense to the payee has no necessary relevance.

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[1] In the state tax area, the Court has overruled at least 8 of its Commerce Clause decisions over the last 15 years. *Complete Auto Transit v. Brady*, 430 *U.S.* 274 (1977) (overruling under the Commerce Clause *Spector Motor Service, Inc. v. O'Connor*, 340 *U.S.* 602 (1951)); *Dep't of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 *U.S.* 734 (1978) (overruling under the Commerce Clause *Puget Sound Stevedoring Co. v. Tax Comm'n of Washington*, 302 *U.S.* 90 (1937) and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 *U.S.* 422 (1947)); *Commonwealth Edison Co. v. Montana*, 453 *U.S.* 609 (1981) (overruling under the Commerce Clause *Heisler v. Thomas Colliery Co.*, 260 *U.S.* 245 (1922); *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 *U.S.* 232 (1987) (overruling under the Commerce Clause *General Motors Corp. v. Washington*, 377 *U.S.* 436 (1964)); *American Trucking Ass'ns, Inc. v. Scheiner*, 483 *U.S.* 266 (1987) (in large part overruling under the Commerce Clause *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 *U.S.* 285 (1935), *Aero Mayflower Transit Co. v. Bd. of R.R. Comm'rs of Montana*, 332 *U.S.* 495 (1947), and *Capitol Greyhound Lines v. Brice*, 339 *U.S.* 542 (1950)).

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros.*, 347 *U.S.* at 344-45. In the case of a multistate corporation, there must be a minimal connection between its interstate activities and the taxing state. *Moorman*, 437 *U.S.* at 272-73. The doctrinal error of *ASARCO* and *Woolworth* is to require a double nexus – a connection between the multistate corporation's activities and the taxing state and a further connection between "the activities of the dividend payor" and the taxing state. *ASARCO*, 458 *U.S.* at 327. Neither traditional Due Process Clause analysis nor the Court's unitary business cases have required such double nexus.[2] A state's justification to tax the recipient

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[2] *See e.g., Wisconsin v. J.C. Penney Co.*, 311 *U.S.* 435 (1940) (where tax was for privilege of carrying on business in Wisconsin, nexus was created by foreign corporation's activities in the state; fact that transaction which triggered the tax (declaration of a dividend) occurred outside Wisconsin was immaterial); *Int'l Harvester Co. v. Dep't of Treasury*, 322 *U.S.* 340 (1944) (where sales took place within taxing state and tax was measured by sales income, fact that corporate seller was based out-of-state and contracts were made out-of-state was not controlling; taxing state had jurisdiction over transaction being taxed); *Nat'l Geographic Society v. California Bd. of Equalization*, 430 *U.S.* 551, 561 (1977) (jurisdiction over the person of an out-of-state seller through its two in-state offices permitted state to require collection of its use tax despite absence of contact between in-state offices and sales in question); *Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 *U.S.* 271 (1924) (taxpayer's presence in taxing state, combined with taxpayer's unitary character, permitted inclusion of foreign source income in tax base despite federal tax loss); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 *U.S.* 207, 221-23 (1980) (ability to source exploration,

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of income from intangibles lies in the protections and benefits it has extended to the recipient's activities within the taxing state. *J.C. Penney Co.*, 311 *U.S.* at 439. There is no basis in the Court's prior cases and no basis in logic for requiring a taxing state to extend protections and benefits to the payor of investment income when the state is not attempting to tax the payor. *Cf. ASARCO*, 458 *U.S.* at 327. In short, *ASARCO* and *Woolworth* fail to recognize who and what is being taxed.

Petitioner asserts in its initial reply brief (Prb10-11) that the *ASARCO/Woolworth* payor-payee test is grounded in the Court's cases holding that there must be a "substantial connection between income generated from out-of-state activities and the taxpayer's operations in the state" in order to establish that the state has " 'given anything for which it can ask return.' *Wisconsin v. J.C. Penney Co.*, 311 *U.S.* 435, 444 (1944)." Like the Court in *ASARCO*, petitioner confuses the issue of who and what is being taxed. Again, New Jersey is not attempting to tax ASARCO's income, and indeed the capital gains at issue were never ASARCO's income to begin with. Rather, New Jersey is taxing Bendix' income from the sale of the ASARCO stock. The question is therefore whether Bendix' investment activities outside New Jersey added

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production and refining income to locations outside taxing state did not prevent apportioned taxation of total unitary income). Application of the unitary business principle to separate corporations filing a combined report confirms this theory of the Due Process Clause. *See* Point III, *infra* at 33.

to the value of Bendix' unitary business, part of which was conducted in New Jersey.

Petitioner's suggestion to the contrary, neither *Wallace v. Hines*, 253 *U.S.* 66, 69-70 (1920), nor *Mobil* supports *ASARCO*. In *Wallace v. Hines*, the Court held that a railroad's out-of-state property did not "in some plain and fairly intelligible way" affect the in-state value of the road and could therefore not be included in apportioning for purposes of a property tax, the railroad's total property to the taxing state. As the Court made clear in *Container*, 463 *U.S.* at 188, property taxes and income taxes differ. As tangible property can be seen and attributed to a particular situs, *Mobil*, 445 *U.S.* at 445, it is possible to determine with greater certainty whether discrete out-of-state properties contribute to in-state values. In the case of an income tax, there is no basis for rejecting formulary apportionment where discrete out-of-state activities cannot be directly linked to activities within the taxing state provided both sets of activities are parts of a single business. The "plain and intelligible" relationship in the case of an income tax may be forged through centralized management or a corporate strategy that links both sets of activities.

Similarly, *Mobil* does not support the *ASARCO/Woolworth* payor-payee test. The Court in *Mobil* states that, in order to avoid Vermont's tax, Mobil would have to establish that the dividend income which Vermont sought to tax was income "earned in the course of activities unrelated to the sale of petroleum products in that State." 445 *U.S.* at 439. Petitioner reads this to refer to the operating income earned by Mobil's subsidiaries, but the statement refers equally to Mobil's management of its subsidiaries

as the source of the dividend income in Mobil's hands. In short, the Court's earlier cases do not lay the groundwork for the *ASARCO/Woolworth* payor-payee rule.[3]

B. *ASARCO* and *Woolworth* Have No Relation to Economic Reality.

Not only are *ASARCO* and *Woolworth* poorly reasoned, they are inconsistent with economic reality. Once it is conceded that income earned on the short term investment of working capital is apportionable without regard to an operating relationship between the recipient and the payor, *ASARCO*, 458 *U.S.* at 337-38 (O'Connor, J., dissenting), there is no rationally determinable point at which the unitary business analysis should shift from the integration of an investment with the operations of the taxpayer to the *ASARCO/Woolworth* test of operating relationships between payor and payee. Moreover, any attempt to distinguish between investments that are integrated with a taxpayer's business and those that are not leads inevitably to the kind of arbitrary distinctions that the Court criticized in *ASARCO*, 458 *U.S.* at 326.

Bendix' analysis of the ASARCO investment, as discussed in our initial brief (Rb36) and as evident in the record, underscores the divergence between the

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[3] Commentators have criticized the *ASARCO* and *Woolworth* opinions. *See* New Jersey's initial brief at 39, n. 21. *See also* Greene, "*ASARCO* and *Woolworth*: Anomalous Anachronisms With Limited Precedential Value," *Tax Notes* 795 (March 7, 1983).

ASARCO/Woolworth payor-payee test and economic reality. In his memorandum to the long range planning committee of the Bendix Board, William Agee states that, "Blackie [the code name for ASARCO] is a firm which nearly matches the qualities we seek" and then continues:

> Particular attention should be paid to Blackie's product diversification particularly in silver, zinc, asbestos, lead, coal and other profitable minerals and to its rich holdings in the M.I.M. Holdings (Mt. Isa project) in Australia reported to be one of the largest mining operations in the world. Allegedly, Blackie's holdings in this project at market value exceed the market value of Blackie's own equities [J.A. 101-102].

While viewed by Bendix' management as one of the most significant of ASARCO's holdings, the Court concluded in *ASARCO* that ASARCO's dividends from M.I.M. were not apportionable because M.I.M. operated independently from ASARCO and any business relationship between the two companies was "nominal." *ASARCO*, 458 *U.S.* at 323.

C. *ASARCO* and *Woolworth* Have Not Promoted Coherence in the Law.

ASARCO and *Woolworth* have spawned continuing litigation and inconsistent, incoherent results in the lower courts.[4] In Missouri and Virginia a capital gain received

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[4] Included in the appendix to this brief is a list of published cases involving the inclusion of intangibles income in the preapportionment tax base (Rsa 21a-25a).

One need look no further than Volume 11 of the New Jersey Tax Court Reports to see the difficulty the lower courts

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on the divestiture of a corporate affiliate is nonunitary income where there is no operating relationship between the stock issuer and recipient of the gain despite facts showing a corporate strategy of buying and selling control or minority interests in other corporations. *See James v. Int'l Tel. & Tel. Corp.*, 654 *S.W.*2d 865 (Mo. 1983); *Corning Glass Works, Inc. v. Virginia Dep't of Taxation*, 402 *S.E.*2d 35 (Va. 1991), *cert. denied*, 112 *S.Ct.* 277 (1991). In New Jersey such gains would likely be apportionable under the New Jersey Supreme Court's decision in this case. In Massachusetts and Colorado the result would be similar to that in New Jersey although the decisions in those states predate *ASARCO* and *Woolworth*. *W.R. Grace & Co. v. Comm'r of Revenue*, 378 *Mass.* 577, 393 *N.E.*2d 330 (1979);

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face in trying to apply the *ASARCO/Woolworth* payor-payee test in a coherent fashion. In this case the New Jersey Tax Court distinguished *ASARCO* and *Woolworth* and relied on the New Jersey Supreme Court's decision in *Silent Hoist & Crane Co., Inc. v. Director, Div. of Taxation*, 100 *N.J.* 1, 494 *A.*2d 775, *cert. denied*, 474 *U.S.* 995 (1985) (Pet. App. C at 45a). In *Int'l Paper Co. v. Director, Div. of Taxation*, 11 *N.J. Tax* 147, 163 (Tax Ct. 1990 en banc), *aff'd*, N.J. Super. Ct., No. A-5138-89T5 (May 13, 1991), *certif. den.*, N.J. Sup. Ct., No. 33,784 (Oct. 16, 1991), the same court reasoned in part that, "[t]he facts of the subject case are more like the facts of *ASARCO* and *Woolworth* than those of *Silent Hoist*, and therefore *ASARCO* and *Woolworth* govern the subject case . . . . " In *American Home Products Corp. v. Director, Div. of Taxation*, 11 *N.J. Tax* 287 (Tax Ct. 1990), appeal pending, N.J. Super. Ct., No. A-4316-90T3, the court analyzed American Home's short-term investments from the point of view of the relationships between the investments and American Home's business, 11 *N.J. Tax* at 303-09, but analyzed American Home's minority stock investments from the point of view of operating relationships between the issuers and American Home. *Id.* at 300-03.

Atlantic Richfield Co. v. Colorado, 198 *Colo.* 413, 601 *P.*2d 628 (1979).

ASARCO and *Woolworth* have produced similar, inconsistent results in the treatment of interest on loans between corporate affiliates. In Arkansas, as the result of the overruling of *Qualls v. Montgomery Ward & Co.,* 266 *Ark.* 207, 585 *S.W.*2d 18 (1979), in *Pledger v. Illinois Tool Works,* 306 *Ark.* 134, 812 *S.W.*2d 101, *cert. denied,* 112 *S.Ct.* 418 (1991), interest on loans to corporate affiliates is not apportionable business income even though the loans are made in the regular course of the lending corporation's business. In South Carolina, Maryland, and Colorado interest on loans to a corporate affiliate is apportionable. *M. Lowenstein Corp. v. South Carolina Tax Comm'n,* 298 *S.C.* 93, 378 *S.E.*2d 272 (1989); *NCR Corp. v. Comptroller of the Treasury,* 313 *Md.* 118, 554 *A.*2d 764 (1988); *Lone Star Steel Corp. v. Dolan,* 668 *P.*2d 916 (Colo. 1983).

Amicus curiae, the Committee on State Taxation, has suggested that *stare decisis* should be given particular weight in the commercial arena and that *ASARCO* and *Woolworth* should therefore not be overruled (COSTb 8). But the fact that business taxpayers and the expectations of those taxpayers are involved has never been a deterrent to the Court's overruling of its prior precedents in the state tax area. *See supra* note 1.

Nor does the possibility that Congress might act under the Commerce Clause suggest a basis for not overruling *ASARCO* and *Woolworth* (Prb16). There is doubt whether Congress could curtail taxpayers' rights under the Due Process Clause as guaranteed by *ASARCO* and *Woolworth. ASARCO,* 458 *U.S.* at 350 (O'Connor, J., dissenting); *State Board of Insurance v. Todd Shipyards Corp.,*

370 *U.S.* 451, 457 (1962) ("Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment"). Moreover, history demonstrates that Congress has legislated infrequently in the state tax area.[5] Furthermore, as demonstrated above at note 1, this Court has not hesitated in the past to overrule prior decisions that Congress could have undertaken to change.

Point II

IF *ASARCO* AND *WOOLWORTH* ARE OVERRULED, THE DECISION SHOULD HAVE RETROACTIVE EFFECT BECAUSE THE DECISIONS WERE NOT CLEAR PRECEDENTS ON WHICH BENDIX RELIED.

A. Under the Various Opinions in *James Beam*, *ASARCO* and *Woolworth* Should Be Overruled Retroactively.

Resolution of the issue of retroactive or prospective overruling is not difficult here. Under any of the views espoused in *Beam* and *Smith*, a decision to overrule *ASARCO* and *Woolworth* should have retroactive effect.

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[5] Over the last 50 years, the only congressional enactment affecting the broad spectrum of multistate businesses is *P.L.* 86-272, 73 *Stat.* 555, 15 *U.S.C.* §381, which restricts the power of a state to impose a tax on or measured by net income if the only in-state activity of an out-of-state corporation is the solicitation of orders for sales of tangible personal property where the orders are accepted, filled, and shipped from points outside the taxing state. *P.L.* 86-272 was enacted in response to this Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 *U.S.* 450 (1959). *See* J. Hellerstein and W. Hellerstein, *State and Local Taxation*, 326-27, 333-34, 387-89, 1004-07 (5th ed. 1988).

Under the plurality opinion in *Beam*, if an overruling decision fails to reserve the issue of retroactive or prospective effect, the usual rule of full retroactivity must be deemed to apply to the parties. *Beam*, 111 *S.Ct.* at 2445. Under this approach, unless the Court specifically holds that its decision to overrule *ASARCO* and *Woolworth* will be prospective or unless it remands to the New Jersey courts to consider the issue, its decision will be retroactive and will apply to all cases currently pending at the administrative or judicial level as well as to all cases where the New Jersey Division of Taxation may issue deficiency assessments under the applicable statute of limitations on assessment.[6] *Beam*, 111 *S.Ct.* at 2448. There is no immediate issue of selective prospectivity in a case like this where the choice of law issue is resolved in the overruling decision itself. *Cf. Beam*, 111 *S.Ct.* at 2445-46.

Under the concurring opinions of Justices Blackmun and Scalia in *Beam* and Justice Stevens in *Smith*, there is no choice to make: All overruling decisions are invariably fully retroactive.

Under the plurality opinion in *Smith* and the dissenting opinion in *Beam*, an overruling decision may be retroactive or prospective depending upon consideration of

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[6] The period is generally five years under the Corporation Business Tax Act. *N.J.Stat.Ann.* §54:10A-19.1(b) (West 1986) ("N.J.S.A."). Since New Jersey has issued assessments against all taxpayers who have failed to include intangibles income in the preapportionment tax base, full retroactivity as to all assessments "not barred by procedural requirements," *Beam*, 111 *S.Ct.* at 2448, is congruent in this State with a more limited retroactive reach to all contested administrative or judicial proceedings.

the three factors discussed in *Chevron Oil. Beam*, 111 *S.Ct.* at 2451-56 (O'Connor, J., dissenting); *Smith*, 110 *S.Ct.* at 2331. Under the *Chevron Oil* test, an overruling decision will be given prospective effect (1) if it establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed," *Chevron*, 404 *U.S.* at 106, (2) if prospective application will further the new rule, and (3) if retroactive application "could produce substantial inequitable results . . . " *Id.* at 107. Application of the *Chevron Oil* test leads equally to the retroactive overruling of *ASARCO* and *Woolworth*.

Petitioner cannot meet the first test under *Chevron Oil* because *ASARCO* and *Woolworth* were not "clear past precedent," and, in any event, Bendix did not rely on them. As suggested by the continuing litigation in the lower courts (Rsa 21a-25a, and see *supra* note 4, *ASARCO* and *Woolworth* were not clear. Some courts saw them as limited to dividends from controlled subsidiaries. *Silent Hoist*, 100 *N.J.* at 19, 494 *A.*2d at 783; *NCR Corp.*, 313 *Md.* at 135, 544 *A.*2d at 772. Others apparently concluded that they did not apply when the tax was on separate corporate entities. *NCR Corp. v. Comm'r of Revenue*, 438 *N.W.*2d 86 (Minn. 1989), *cert. denied*, 493 *U.S.* 845 (1990). Still other courts applied *ASARCO* and *Woolworth* but ignored the requirement of substantial operating links, relying instead on administrative and financial connections. *Super Valu Stores v. Iowa Dep't of Revenue and Finance*, 479 *N.W.*2d 255 (Iowa 1991). Still others followed them to the point of overruling their prior decisions. *Pledger, supra.* Moreover, when the Court issued its opinion in *Container*

scarcely one year after *ASARCO* and *Woolworth* came down, it was readily apparent that the two decisions were on shaky ground. In *Container*, the Court made clear that actual, active control and a "substantial flow of goods" are not the sole criteria for a unitary business. *Container*, 463 *U.S.* at 177-79.[7]

Moreover, Bendix could not have relied on *ASARCO* and *Woolworth* when it engaged in the conduct that gave rise to the ASARCO gain. The Bendix Board authorized the sale of the ASARCO stock on October 7, 1980 (J.A. 171, ¶63), and the sale was completed during the first half of 1981 (J.A. 172, ¶67). As Bendix' sale of the ASARCO stock preceded the Court's June 29, 1982 decisions in *ASARCO* and *Woolworth*, Bendix plainly did not rely on those opinions when it decided to sell the stock and structured the transaction.[8] *Beam*, 111 *S.Ct.* at 2455. The fact that Bendix filed its 1981 return on July 15, 1982 (record at 231A), approximately two weeks after

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[7] Scholarly commentary has not failed to recognize *Container*'s shift in approach to the unitary business determination. *See* J. Hellerstein, *State Taxation I Corporate Income and Franchise Taxes*, S197 (1989 Cum. Supp.): "In *Container* . . . the Court. . . appears to have adopted the same type of non-intervention principle with respect to the definition of a unitary business that it had enunciated in the *Moorman* case with respect to challenges to the unfairness of a State apportionment formula."

[8] Additionally, Bendix paid its 1981 corporation business tax liability before *ASARCO* and *Woolworth* came down. On January 15, 1982, Bendix paid the amount it estimated would be due for its 1981 fiscal year, *viz.* $3 million (record at 240A), an amount which included the tax on the ASARCO gain.

ASARCO and *Woolworth* were issued and claimed a refund based on the two decisions (J.A. 206, 200), does not establish reliance on the *ASARCO/Woolworth* rule because " 'the underlying transaction' " occurred prior to the two decisions. *See Smith,* 110 *S.Ct.* 2335-36. On the contrary, at the time that Bendix sold the *ASARCO* stock, it was clear under New Jersey law that a corporate taxpayer was required to pay tax on an apportioned share of its "entire net income."[9] *F.W. Woolworth Co. v. Director, Div. of Taxation,* 45 *N.J.* 466, 213 *A.*2d.1 (1965).

Under the second and third *Chevron Oil* tests – whether the new rule will be furthered by retroactive or prospective overruling and whether the equities favor retroactive or prospective overruling – retroactive overruling of *ASARCO* and *Woolworth* is equally appropriate. In pending cases, the unitary business issue in New Jersey currently implicates approximately $34.6 million in state revenue.[10] The potential annual refund exposure is a

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[9] Under *N.J.S.A.* 54:10A-4(k) "entire net income" is defined as federal taxable income before the net operating loss deduction and special deductions. While dividends received from other corporations are wholly or partially excluded, *N.J.S.A.* 54:10A-4(k)(5), no exclusion applies to capital gains or interest income.

[10] This figure includes a total of approximately $19.3 million in assessments and $4.1 million in refund claims at the administrative level and $4.7 milion in assessments and $6.5 million in refunds in pending court actions. Most of the court cases involve pre-*ASARCO/Woolworth* tax years, while the agency proceedings involve post-*ASARCO/Woolworth* tax years. *See* Rsa 24a-25a.

maximum of roughly $110 million.[11] It would not further the new rule of law if New Jersey were to prevail but at the same time forfeit the revenue riding on the pending cases.[12] Petitioner, on the other hand, has no vested right in a refund to which it is not entitled under the Due Process Clause. From an equitable stand point, New Jersey acted in accordance with the correct rule and should not be penalized for having done so, while petitioner cannot claim reliance on *ASARCO* and *Woolworth* once *Container* was decided and in fact did not rely on the two decisions.[13]

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[11] The New Jersey statute of limitations for filing claims for refund is generally two years. *N.J.S.A.* 54:49-14. Some portion of the $110 million would be subject to the CBT under the *ASARCO/Woolworth* payor-payee test.

[12] Petitioner may contend that New Jersey deserves to forfeit these revenues for ignoring the Court's decisions in *ASARCO* and *Woolworth*. To the contrary, the New Jersey courts considered those cases and attempted to deal with them on a principled basis. See *supra* note 4 and *Mobil Oil Corp. v. Director, Div. of Taxation*, 11 *N.J. Tax* 344 (Tax Ct. 1990), *aff'd*, per curiam N.J. Super. Ct. No. A-2326-90T5 (March 4, 1992).

[13] The unsettled state of the law throughout the country suggests that the retroactive overruling of *ASARCO* and *Woolworth* would be an acceptable result in states other than New Jersey. Moreover, multistate taxpayers would receive some protection through the applicable statutes of limitation on assessment and from the statutory distinction in the 27 UDITPA states (and the seven additional states that follow UDITPA) between business and nonbusiness income.

B. *Chevron Oil* States the Appropriate Rule for Determining the Issue of Retroactive or Prospective Overruling.

While all the opinions in *Beam* and *Smith* point to retroactive overruling here, it seems to us that the *Chevron Oil* rule is the preferable one. Prosepctive overruling needs to be retained in order to reconcile a new constitutional rule "with reliance interests founded upon the old," interests that cannot be accommodated through an invariable rule of " 'absolute retroactive invalidity . . . ' " *Lemon v. Krutzman*, 411 *U.S.* 192, 198-99 (1973) (plurality opinion), quoting *Linkletter v. Walker*, 381 *U.S.* 618, 627 (1965).

The ability, on rare occasions, to overrule prospectively answers to the same concern that prompts a reluctance to condone retroactive statutory enactments and administrative rules. *Bowen v. Georgetown University Hospital*, 488 *U.S.* 204, 208 (1988). Absent clear language mandating retroactive application, prospectivity is favored to avoid unreasonably harsh results. *Id.*; *Kaiser Aluminum v. Bonjorno*, 110 *S.Ct.* 1570, (1990) (retroactive application of newly enacted statute "is contrary to fundamental notions of justice . . . ") (Scalia, J., concurring). While adjudication generally operates with retroactive effect, *Bowen*, 488 *U.S.* at 221 (Scalia, J. concurring), the concern for upsetting reasonable reliance on past statutory law that informs the prospective application of statutes, should, in exceptional cases, apply equally to judge-made law.

Purely prospective overruling does not violate "the principle of treating similarly situated defendants the

same." *Beam*, 111 *S.Ct.* at 2450 (Blackmun, J., concurring). As the decision is effective as to everyone in the future and as to no one retroactively, the concerns that prompted the decision in *Griffith v. Kentucky*, 479 *U.S.* 314 (1987), in the criminal law context are not present in the case of purely prospective overruling. More fundamentally, it is questionable that states and taxpayers throughout the country are necessarily "similarly situated" to the parties before the Court in a state tax case. *Smith*, 110 *S.Ct.* at 2342 (plurality opinion). Reliance interests may vary from state to state. Thus, selective prospectivity should be retained under *Chevron Oil*. This is particularly so in the state Tax area where it is uncertain after *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dep't of Business Regulation of Florida*, 110 *S.Ct.* 2238, 2254-56 (1990), that the equities in a particular case play more than a minor role in determining an appropriate remedy. *Smith*, 110 *S.Ct.* at 2332 (plurality opinion); *cf. Beam*, 111 *S.Ct.* at 2447-48 (plurality opinion).

While purely prospective overruling may raise a case or controversy issue under Article III, *Beam*, 111 *S.Ct.* at 2449 (Blackmun, J., concurring), at least in the context of a state tax, the concern seems more theoretical than real. The parties before the Court clearly have a live controversy on the merits – the constitutional validity of the tax. Due to the recurring nature of that controversy, its resolution has a direct effect on the parties even if the decision is purely prospective; either the state tax is effectively enjoined, *see Smith*, 110 *S.Ct.* at 2342, or it is validated and permits assessments for periods beginning on the date of the decision. As purely prospective overruling does affect the parties before the Court, at least in the context of state

taxes, it would not seem to threaten the integrity of judicial review. *Cf. Beam*, 111 S.Ct. at 2450 (Blackmun, J., concurring).[14]

Prospective overruling may indeed be legislative in nature, *Beam*, 111 *S.Ct.* at 2450-51 (Scalia, J., concurring), but common law judges have historically been viewed as "legislating" in a restricted, judicial manner. *Southern Pacific Co. v. Jensen*, 244 *U.S.* 205, 221 (1917) (Holmes, J., dissenting); O.W. Holmes, *The Common Law*, 35-36 (1881); B. Cardozo, *The Nature of the Judicial Process*, 113-17 (1921).

> [The judge] legislates only between gaps. He fills the open spaces in the law. . . . None the less, within the confines of these open spaces and those of precedent and tradition, choice

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[14] Other recurring controversies between governments and citizens where prospective overruling of state or local law has been deemed appropriate, include challenges to municipal bond statutes, and election laws. *Douglass v. Pike County*, 101 *U.S.* 677 (1880); *Chicot County Drainage District v. Baxter State Bank*, 308 *U.S.* 371 (1940); *Allen v. State Board of Elections*, 393 *U.S.* 544 (1968); *Cipriano v. City of Houma*, 395 *U.S.* 701 (1969); *City of Phoenix v. Kolodziejski*, 399 *U.S.* 204 (1970); *Buckley v. Valeo*, 424 *U.S.* 1 (1976).

Despite the constraints of Article III, the Court has exercised its jurisdiction where there is an active controversy between the parties which is likely to recur although the case before the Court has become moot. *Honig v. Doe*, 484 *U.S.* 305 (1988) (illegal exclusion of mentally disabled adolescent from school likely to recur); *Burlington Northern R. Co. v. Maintenance Way Employees*, 481 *U.S.* 429, 436, n.4 (1987) (future disputes likely over a collective bargaining agreement); *Southern Pacific Terminal Co. v. I.C.C.*, 219 *U.S.* 498, 515 (1911) (ruling of I.C.C. likely to be repeated).

> moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. [*Id.* at 113-15]

In the same essay, then Judge Cardozo recognized that, although judge-made law generally operates retrospectively with little or no hardship, "when the hardship is felt to be too great or to be unnecessary, retrospective operation is withheld." *Id.* at 147.[15] The use of a dispute between two parties as a "spring board" to a broad rule of constitutional law would seem as legislative in character as the prospective overruling of a constitutional decision. Fallon and Meltzer, "New Law, Non-Retroactivity and Constitutional Remedies," 104 *Harv.L.Rev.* 1733, 1801 (1991).

Any concern that prospective overruling makes overruling too easy and threatens respect for the judicial system, *Beam,* 111 *S.Ct.* at 2444 (plurality opinion), is belied by this Court's infrequent adoption of prospective overruling in the civil arena, both before and after *Chevron Oil.*[16] In New Jersey prospective overruling is not the

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[15] In *Great Northern Railway Co. v. Sunburst Oil & Ref. Co.,* 287 *U.S.* 358, 365-66 (1932), in an opinion authored by Justice Cardozo, the Court declined to incorporate into the constitutional canon of fundamental due process of law, the Blackstonian legal doctrine that, when prior law is overruled, it must be viewed as if it had never existed.

[16] In addition to the cases cited in note 14 *supra, see England v. Louisiana State Bd. of Medical Examiners,* 375 *U.S.* 411 (1964) (under abstention doctrine if litigant freely submits federal claim to state courts, he is precluded from litigating

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rule. Only in *Salorio v. Glaser,* 93 *N.J.* 447, 461 *A.*2d 1100 *cert. denied,* 464 *U.S.* 993 (1983), did a New Jersey court agree to prospective overruling in a tax case. In *Exxon Corp. v. Hunt,* 109 *N.J.* 110, 123-24, 534 *A.*2d 1 (1987), the New Jersey Supreme Court refused to give prospective effect to this Court's decision in that case, 475 *U.S.* 355 (1986), on the ground that the decision did not establish a new principle of law under *Chevron Oil.* In *Private Truck Council of America v. State,* 111 *N.J.* 214, 544 *A.*2d 33 (1988), aff'g 221 *N.J. Super.* 89, 534 *A.*2d 13 (App. Div. 1987), the New Jersey Supreme Court struck down the State's retaliatory truck tax under the Commerce Clause and rejected, without comment, the State's prospectivity argument. In *American Trucking Ass'n v. Kline,* No. 07-14-1667-85 MVT (Sept. 8, 1988) the New Jersey Tax Court concluded in a letter opinion[17] that this Court's decision in *American Trucking Ass'ns, Inc. v. Scheiner,* 483 *U.S.* 266 (1987),

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federal claim in federal court, but rule would not be applied to pending case). *Lemon v. Kurtzman,* 411 *U.S.* 192 (1973) (statute authorizing public subsidy to private sectarian schools violated First Amendment but ruling applied prospectively because schools relied on presumptively valid statute); *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 *U.S.* 50 (1982) (ruling that Bankruptcy Act of 1978 unconstitutionally conferred Article III judicial powers on bankruptcy judges would apply prospectively); *Smith* (decision that flat highway taxes are unconstitutional would apply prospectively because decision established a new principle of law).

[17] The case was settled after this Court's decision in *Smith.* A copy of the opinion is included in the appendix at Rsa 1a-20a.

should be retroactive because it was foreshadowed by *Complete Auto Transit, supra.*

The Court's recent decisions have done much to level the playing field between state taxing authorities and taxpayers. In *McKesson Corp.*, the Court curtailed the common law volunteer rule, under which taxes "voluntarily" paid could not be recovered, by holding that the Due Process Clause requires meaningful retroactive relief if a state forces a taxpayer to pay before obtaining a judicial ruling that the tax is valid. In *Dennis v. Higgins* 111 *S.Ct.* 865 (1991), the Court facilitated constitutional challenges to state taxes by holding that attorneys' fees under 42 *U.S.C.* § 1988 are available to taxpayers who successfully challenge a state tax under the Commerce Clause.

Unlike the common law volunteer rule, the doctrine of purely prospective overruling in the civil arena has stood the test of time, most likely because it comports with an elemental sense that one should be able to rely on the current state of the law. Prospective overruling thus serves the goal of predictability in the law. Here, however, retroactive overruling is appropriate because *ASARCO* and *Woolworth* were never settled precedent, and Bendix did not rely on the two decisions when it decided to sell the ASARCO stock.

POINT III

IF *ASARCO* AND *WOOLWORTH* ARE OVERRULED, THE COURT SHOULD CONSTRUE THE DUE PROCESS CLAUSE TO PERMIT A NONDOMICILIARY STATE TO APPORTION ALL THE INCOME OF A SEPARATE MULTISTATE CORPORATE TAXPAYER, THEREBY ACHIEVING PREDICTABLE, FAIR, AND ECONOMICALLY REAL RESULTS.

The constitutional principle we propose is simply that when a nondomiciliary state seeks to impose its corporate net income tax on a single multistate taxpayer, the only nexus required by the Due Process Clause is that the taxpayer be engaged in business within the taxing state. In that event the nondomiciliary state has a sufficient connection with the taxpayer to include all its income in the apportionable tax base. The unitary business is congruent with the single corporation. On the other hand, when a state seeks to compute its tax based on a combination of income from two or more separate legal entities, the Clause requires that the separate entities be linked through a unitary business. Without that link, the taxing state may have insufficient connections with the separate legal entities based outside its borders to satisfy the Due Process Clause.

A. Nexus to Tax a Multistate Corporate Taxpayer Should Be Based on the Corporation's Presence within a Nondomiciliary State.

In place of *ASARCO* and *Woolworth*'s requirement of an operating relationship between the payor and payee of intangibles income, we suggest that the Court adopt a rule of full apportionment grounded in the fundamental

purpose of the Due Process Clause. As made clear in Point I above, insofar as state taxes are concerned, the Clause requires that the person, property, or transaction sought to be taxed must be within the territorial confines of the taxing state. *Miller Bros.*, 347 *U.S.* at 344-45. When this is the case, the taxing state has given something "for which it can ask return." *J.C. Penney Co.*, 311 *U.S.* at 444. As a corollary to that principle, when a tax is based on doing business within the taxing state, the fact that events occurring outside the state may trigger the tax "does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." *Id.* at 445.

In each case the controlling question is who or what is being taxed and whether that person or transaction is within the state's territorial jurisdiction. If the tax is a transactional tax, the transaction must be localized within the taxing state. *See, e.g., American Oil Co. v. Neill,* 380 *U.S.* 451 (1965) (where taxable event was the receipt of gasoline by a licensed dealer and delivery to the dealer occurred outside the taxing state, fact that dealer was licensed and did business within taxing state did not create nexus over the taxed transaction); *Int'l Harvester Co.* discussed *supra* note 2. On the other hand, if an out-of-state seller is being forced to collect the state's use tax, the question is whether the seller, not the sale, is sufficiently within the state's territorial jurisdiction. *See Miller Bros.,* (where tax was on use of property within taxing state, out-of-state vendor having a lack of purposeful contacts with taxing state could not be required to collect

the tax); *National Geographic Society v. California Bd. of Equalization, supra,* discussed *supra* note 2.[18]

A state corporate net income or franchise tax is a tax on corporations based on income derived from business activities within the taxing state. *See e.g. N.J.S.A.* 54:10A-2; *Northwestern States Portland Cement Co. v. Minnesota,* 358 *U.S.* 450, 464 (1959) (concluding that the net income taxes at issue did not offend the Due Process Clause because "[t]he taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State"). Since the state is exercising its taxing power with respect to a corporation doing business within it, the presence of that corporation within the taxing state satisfies the requirements of the Due Process Clause. "The requisite 'nexus' is supplied [because] the corporation avails itself of the 'substantial privilege of carrying on business' within the State. . . . " *Mobil,* 445 *U.S.* at 437, quoting *J.C. Penney,* 311 *U.S.* at 444-45. Since the taxing state has jurisdiction over the corporation, there should be no requirement of a further nexus as to particular out-of-state activities and/or particular streams of income. In a single corporation context,

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[18] *See also Int'l Harvester Co. v. Wisconsin Dep't of Taxation,* 322 *U.S.* 435, 441-42 (1944) (where tax was for doing business within taxing state and was withheld from dividends paid to shareholders, fact that shareholders were nonresidents did not destroy the state's power to tax the corporation's earnings); *Cleveland, Painesville and Ashtabula R.R. Co. v. Commonwealth of Pennsylvania,* 82 *U.S.* 179 (15 *Wall.* 300) (1873) (state tax withheld from interest paid by domiciliary corporations on corporate bonds to nonresidents was a tax on property of the bondholders and thus exceeded the state's taxing jurisdiction).

there is thus no theoretical justification for a unitary business principle when employed to fragment the corporate entity over which the taxing state has jurisdiction. The governing constitutional principle is clear. Jurisdiction to tax a single corporation extends the state's taxing power to the corporation's entire income.[19]

B. The Proposed Rule Would Be Consistent with the Court's Prior Cases.

Recognition of the fact that all income of a single corporation is earned in a unitary business does not mean rejecting the principles set forth in the Court's long line of unitary business cases preceding *ASARCO* and *Woolworth.* With the exception of those two cases, none of the Court's unitary business cases involving the apportioned taxation of *net income* have held that the taxpayer's operations were not unitary.[20] Throughout these earlier cases,

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[19] The idea is not revolutionary. Shortly after *ASARCO* and *Woolworth* were decided, a former tax commissioner from a state that apportions the entire tax base argued that, "The requisite nexus is supplied when the corporation and some of its income producing activities are connected with the taxing jurisdiction. If this is the case, all of that corporation's income may be included in a fairly apportioned tax base for state income tax purposes. There is no requirement that each increment of income have a relationship to the taxing jurisdiction. *Moorman . . . ; Northwestern States Portland Cement. . . .* " Lathrop, "Due Process Considerations and the Apportionment of Dividend Income: A Dissent From the *ASARCO* and *Woolworth* Decisions," 16 *Tax Notes* 1 (July 5, 1982).

[20] *See e.g. United States Glue Co. v. Oak Creek,* 247 *U.S.* 321 (1918) (apportioned net income tax was not a direct tax on

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the Court applied the unitary business principle to the activities of a single corporation and invariably concluded that the single corporation's business was indivisible (see Rb20-23). Not only are the holdings consistent with the proposed rule that the unitary business of a

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interstate commerce); *Underwood Typewriter Co. v. Chamberlain,* 254 *U.S.* 113 (1920) (where profits were earned in series of transactions beginning with manufacturing in taxing state and ending with sales in other states, state could apportion the total profits); *Bass, Ratcliff & Gretton v. State Tax Comm'n,* 266 *U.S.* 271 (1924) (corporation that manufactured and sold ale was unitary; federal tax loss thus not determinative); *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* 283 *U.S.* 123, 133 (1931) (generally, all factors in a manufacturing "enterprise are essential to the realization of profits," but apportionment formula operated unfairly under the particular facts); *Butler Bros. v. McColgan,* 315 *U.S.* 501 (1942) (common ownership, centralized management, and economies of scale established that taxpayer's territorially organized business was unitary); *Mobil Oil Corp. v. Commissioner of Taxes,* 445 *U.S.* 425 (1980) (foreign subsidiaries were part of taxpayer's integrated petroleum business); *Exxon Corp. v. Wisconsin Dep't of Revenue,* 447 *U.S.* 207 (1980) (petroleum company characterized by vertical integration and centralized management was unitary business).

The railroad property tax cases of *Wallace v. Hines,* 253 *U.S.* 66 (1920) and *Norfolk and Western R. Co. v. Missouri Tax Commission,* 390 *U.S.* 317 (1968), in which the Court concluded that certain out-of-state property could not be included in determining the apportioned value of the railroad's in-state property reflect the inherent difference between a tax on tangible property that can be seen and sited to a particular location, thereby providing a benchmark against which to test the fairness of an apportionment formula, and a tax on income that has no readily identifiable source. *See Wheeling Steel Corp. v. Fox,* 298 *U.S.* 193, 212 (1936).

single corporation include all its activities, but the thinking of these cases leads logically to the same conclusion. In *Butler Bros.*, the Court suggested that manufacturing enterprises are virtually always unitary. Quoting from *Hans Rees' Sons*, 283 *U.S.* at 133, the Court stated that, "[T]he enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits." *Butler Bros.*, 315 *U.S.* at 508. In *Mobil*, the Court cast doubt on any attempt to geographically source particular streams of income, stating that, since the "factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' " *Mobil*, 445 *U.S.* at 438. These rationales are consistent with a conclusion that the unitary business may properly be defined as all the activities of a single corporation because all the activities, disparate as they may seem, are linked by common ownership, common management and presumptive economies of scale and transfers of value. *Id.*

The Court's unitary business cases subsequent to *Container* point in the direction of the principle we propose because the Court consistently has refused to splinter the unitary business of a single corporate entity. *See Shell Oil Co. v. Iowa Dep't of Rev.*, 488 *U.S.* 19 (1988) (oil and gas production income from Outer Continental Shelf held includable in preapportionment tax base); *Amerada Hess Corp.* (nondomiciliary state's denial of a deduction for site-specific, out-of-state costs did not prevent the apportioned taxation of unitary business' net income); *Trinova Corp.*, 111 *S.Ct.* 831 (unitary business' value added

can no more be sourced to a geographic location than can income, even though "discrete components" of the tax base may appear "in isolation susceptible of geographic designation"). If the Due Process Clause does not require the fragmentation of the unitary tax base to account for wellhead costs, compensation, and depreciation, the Clause cannot logically require that the same tax base be fragmented to account for "discrete components" of income.

These post-*Container* cases suggest as well that the Court has moved away from the early rationale of the unitary business principle which justified apportioned taxation only when income could not in fact be sourced to a particular location. *See Underwood Typewriter Co.,* 254 *U.S.* at 121; *Mobil,* 445 *U.S.* at 452 (Stevens, J. dissenting), and J. Hellerstein, *State Income Taxation I Corporate Income and Franchise Taxes,* 389-92 (1983).

C. Unitary Links Would Be Required to Combine Separate Corporate Entities.

Testing our proposed principle in the setting of a combined report confirms that it is conceptually right. In the case of a combined report as used in California and other states, the taxpayer's preapportionment tax base includes not only the income of the taxpayer but the income of other corporate affiliates linked by the requisite degree of control and conducting a unitary business with the taxpayer. *See Container,* 463 *U.S.* at 168.[21] While

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[21] A helpful discussion on the mechanics of combined reporting is found in Warren, "Principles of Formulary Apportionment," 1 *State & Local Tax Portfolio Series,* 241-48 (1989).

the taxpayer filing the combined report must be within the territorial jurisdiction of the taxing state, there is no requirement that other members of the unitary group whose income is being combined have any presence there. As there may be no jurisdiction over the person of these separate legal entities, the Due Process Clause requires that the taxing state obtain nexus in some other way over the income of these separate corporations. *Miller Bros.*, 347 *U.S.* at 344-45. The necessary link is created by the existence of a unitary business *between* the separate corporate entities, specifically a degree of control and operating relationships, which create transfers of value on an operational level. *Container*, 463 *U.S.* at 166. Thus, the Court's holding and reasoning in *Container* are fully consistent with the proposed principle. In a combined reporting situation, operating relationships between separate corporations are required by the Due Process Clause because the taxing state otherwise may have no connection with the out-of-state income that is included in the tax base.[22]

D. Fair Apportionment Would Continue To Be Tested under the Internal and External Consistency Tests.

To satisfy the second prong of the Due Process Clause and the fair apportionment requirement of the

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[22] Again, under the scheme of the New Jersey CBT Act, the preapportionment tax base does not include the income of any corporation other than the one being taxed. The income of unitary affiliates is not included; what is included are 50% of dividends paid by such affiliates to the taxpayer or other intangibles income such as capital gains and interest. *See* Rb12-13.

Commerce Clause, a state may tax only that portion of a nondomiciliary corporation's net income that is "rationally related to 'values connected with the taxing State.' " *Moorman*, 437 *U.S.* at 273, quoting *Norfolk & Western R. Co.*, 390 *U.S.* at 325; *Mobil*, 445 *U.S.* at 436-37. In *Container* the Court elaborated on the requirement of fair apportionment, stating that a tax must have both internal consistency and external consistency. 463 *U.S.* at 169. The internal consistency test is met in the case of an apportioned net income tax if "the formula . . . [is] such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* Full apportionment of all corporate income meets the internal consistency test because, if every state had a comparable taxing scheme, no more than 100% of a corporation's income would be subjected to tax. To meet the external consistency test, "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Id.* The three-factor formula in general meets the external consistency test because "payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated." *Id.* at 183.[23]

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[23] There is substantial disagreement among commentators as to the theoretical basis for the three-factor apportionment formula, some believing that its function is to source the corporation's income, others that the benefits and protection afforded by each state should control. *See* J. Hellerstein, *State Taxation I Corporate Income and Franchise Taxes, supra* at 368-70, citing authorities; R. Lathrop, *supra*, at 37 on LEXIS.

This case does not raise an issue of external consistency because petitioner has failed to pursue the issue in this Court.[24] Nevertheless, since the Court is interested in governing constitutional principles and since our proposed rule would increase the territorial reach of the states' taxing power, some discussion of fair apportionment seems appropriate.

On a theoretical basis, it might appear that, if intangibles income is to be included routinely in the tax base, the three-factor formula should give some recognition to the property producing the income. *Mobil,* 445 *U.S.* at 460-61 (Stevens, J. dissenting).[25] With minor exceptions for particular industries, no state includes intangible property in the property factor. *See N.J.S.A.* 54:10A-6(A); 1 *Multistate Corporate Income Tax Guide* ¶ 152 (CCH). On further study, it is not so clear that including intangible property in the factor is the correct solution. If income from intangibles is an " 'integral part' " of a unitary business, *ASARCO,* 458 *U.S.* at 347 (O'Connor, J., dissenting), it may be just as accurate conceptually to conclude that such income is properly apportioned using the three-

[24] Bendix argued the issue in the lower courts with no success. *See* Pet. App. A at 22a-24a; Pet. App. C at 66a-67a.

[25] Another solution would be to include the factors of the issuers of the intangibles in the three-factor formula of the payee. *Mobil,* 445 *U.S.* at 460-61 (Stevens, J. dissenting). This adjustment appears to be inconsistent with the theory of a statute, such as New Jersey's CBT Act, that taxes the income of the payee and does not use combined reporting. Moreover, while the solution may have some conceptual appeal when applied to dividends from controlled subsidiaries, which might be regarded as a proxy for the subsidiaries' income, the idea appears of questionable validity when applied to capital gains that are not the issuer's income in any sense.

factor formula without adjustment. The three-factor formula reflects the manner in which income is generated throughout the unitary business, and intangibles income arises as a result of the activities of the entire unitary business. *See* the initial Brief *Amicus Curiae* of Multistate Tax Commission in Support of Respondent at 25-27. Moreover, as a practical matter, inclusion of intangible property in the formula raises the difficult issue of determining its situs. *Mobil*, 445 *U.S.* at 445; *ASARCO*, 458 *U.S.* at 345-47 (O'Connor, J., dissenting); *Curry v. McCanless*, 307 *U.S.* 357 (1939); *Ford Motor Credit Co. v. Dep't of Revenue*, 111 *S.Ct.* 2049 (1991), aff'g by an equally divided court, 537 *So.*2d 1011 (Fla. App. 1st Dist. 1988).

Due to the theoretical uncertainty, practical problems, and absence of an adequate record, the Court should not attempt to resolve the fair apportionment issue in this case.[26] *J.C. Penney Co.*, 311 *U.S.* at 445. An adequate record would include a complete picture of a multistate corporation's tax liabilities throughout the states in which it did business. Apparent overtaxation by one state may be mitigated by undertaxation elsewhere. The guiding principle should be the practical effect of the tax, *Complete Auto Transit*, 430 *U.S.* at 279, and the economic reality of the taxpayer's actual tax burden.

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[26] It should be noted that the proposed rule would not create the problem; the problem exists already whenever income from intangibles is included in the apportionable tax base.

E. The Potential for Double Taxation is Not a Constitutional Impediment.

The possible disadvantage of the principle we propose – full apportionment of all income realized by a single corporation – is an increase in the potential for double taxation. A constitutional rule that permits the states to apportion all income of a single corporation increases the risk of double taxation because a portion of the same income would be treated by the UDITPA states as nonbusiness income and allocated 100% to the corporation's commercial domicile. The question is thus whether an increased risk of double taxation is constitutionally permissible. We believe it is.[27]

The principles discussed to this point – nexus and fair apportionment – derive from both the Due Process and Commerce Clauses. *Amerada Hess*, 490 *U.S.* at 79-80; *Trinova*, 111 *S.Ct.* at 829-832 (analyzing issue of fair apportionment under Commerce Clause); *Moorman*, 437 *U.S.* at 271-75 (analyzing issue of fair apportionment under Due Process Clause); *Container*, 463 *U.S.* at 169-71 (analyzing issue of fair apportionment under Due Process and Commerce Clauses). The issue of double taxation, however, is plainly an issue under the Commerce Clause, specifically whether the tax discriminates against interstate commerce. *See Moorman*, 437 *U.S.* at 276; *Mobil*, 445

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[27] Like the fair apportionment issue discussed above, the double taxation problem is one of degree since the current system may produce double taxation by a UDITPA and full apportionment state. *Moorman*, 437 *U.S.* at 278-79. As indicated in the appendix to this brief (Rsa 21a-23a), allegations of double taxation of intangibles income are relatively infrequent.

U.S. at 443. The holdings in *Moorman, Mobil* and *Container* make clear that the potential for double taxation in the context of an apportioned net income tax does not render the apportioned tax unconstitutional.

Moorman, having its manufacturing facilities in Illinois and salesmen and warehouses in Iowa, argued that the Iowa single-factor sales formula resulted in double taxation of a portion of its net income because Illinois used the standard three-factor formula. Finding no actual double taxation, the Court rejected Moorman's argument on the ground that the Commerce Clause does not require the states to adopt a single, uniform system of taxation that would avoid all possible duplication. *Moorman*, 437 *U.S.* at 277-279. Specifically, due to the states' differing treatment of nonbusiness income, with some states attributing such income to a single situs and others apportioning it, the potential for double taxation is inherent in the federal system. *Id.* at 278-79. In *Mobil*, the Court rejected the idea that the taxing power of the state of commercial domicile " should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other states." *Id.* at 446. Since several states had an adequate connection with Mobil's dividend income and since Vermont's tax was on income, not property, Vermont's apportioned tax was not forbidden by the Commerce Clause. *Id.* Continuing the theme that income and property taxes differ, the Court in *Container* upheld California's apportioned taxation of the income of Container's subsidiaries, income that was in fact taxed by

other nations. *Container*, 463 *U.S.* at 187-88.[28] Unless the Court were to reject the principles of these cases, any greater risk of double taxation created by our proposed rule is constitutionally acceptable.

F. The Proposed Rule Would Permit State Law Variations.

As a corollary, we strongly urge that the Court adopt a rule of full apportionment that would permit the states to limit their taxing power if they so choose. "[T]he Constitution imposes no single formula on the States," *Container*, 463 *U.S.* at 164, and, more pointedly, "the unitary business concept . . . is not, so to speak, unitary. . . . ," *id.* at 167, and *see Moorman*, 437 *U.S.* at 279. If a state chooses, by statute or otherwise, not to exercise its full taxing power under the Due Process Clause, it should be permitted to make that choice. The UDITPA states that distinguish between business and nonbusiness income should be able to continue to do so. States wishing to entertain the possibility of two or more discrete,

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[28] State personal income taxes and intangible property taxes create a greater risk of double taxation. In the case of personal income taxes, the state of residence or domicile can tax all the income of a resident individual, while another state may tax the same income to the extent it is earned within the taxing state. *New York ex rel. Cohn v. Graves*, 300 *U.S.* 308, 313 (1937); *Shaffer v. Carter*, 252 *U.S.* 37 (1940). In *Curry v. McCanless*, 307 *U.S.* 357 (1939), the Court held that two states could each impose its inheritance tax on the transfer of intangible property to a testamentary trust. The state of the decedent's domicile had the power to tax the transfer, and the state where the transfer in trust occurred had a similar power.

nonunitary lines of business within a single corporation should not be constrained. The distinctions, however, would be based in state law. *Cf. Container*, 463 *U.S.* at 167-68.[29]

G. The Proposed Rule Would Be Predictable, Consistent with Economic Reality, and Fair.

The advantages of the rule we propose include its clarity and predictability and its congruence with economic reality. Within single corporate entities, it would no longer be necessary to attempt "slicing a shadow." *Container*, 463 *U.S.* at 192. Nor would the inquiry be directed at determining "largely unquantifiable transfers of value that take place among the components of a single enterprise." *Id.* at 164-65. Taxpayers and state taxing authorities alike would be relieved of the expense and

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[29] A permissive rule of full apportionment would similarly leave in place New York State and New York City's unique approach to the apportionment of investment income under which a taxpayer derives an investment allocation percentage reflecting the degree of presence within the taxing jurisdiction of the issuers of the securities in which the taxpayer has invested. *See Allied-Signal, Inc. v. Commissioner of Finance*, 79 *N.Y.S.*2d 73 (N.Y.Ct.App. 1991), involving the same capital gain that is at issue here and concluding that under New York City's statutory scheme the gain was apportionable based on ASARCO's presence in the taxing jurisdiction. As indicated by petitioner's counsel during argument, New Jersey bases its claim to tax a share of the ASARCO gain on a different theory, so that the presence of ASARCO in New Jersey is irrelevant (T4-15 to T5-20). New Jersey agrees with petitioner on this point.

uncertainty of litigating and relitigating the unitary business issue, with each case turning on its peculiar facts. State courts would be relieved of the burden of dealing with elusive legal concepts and lengthy factual records where "the line between 'historical fact' and 'constitutional fact' is often fuzzy at best." *Id.* at 176.

In addition, the rule would align the nexus requirement of the Due Process and Commerce Clauses with the economic reality of corporate investing. In its more recent cases involving the taxation of multistate businesses, the Court has tried "to accommodate the necessary abstractions of tax theory to the realities of the marketplace." *Trinova*, 111 *S.Ct* at 828. The marketplace draws no firm line between passive and operational investments. Companies make all kinds of investments that are as much a part of their business as their traditional operations. An article in *Forbes Magazine* lists 15 companies having net cash equal to at least 45% of their market value and characterizes one of the companies, a brewing company, as a 'money market fund.' Hardy and Balancia, "Liquid Assets," *Forbes Magazine* 130 (Feb. 18, 1991). There is a growing trend among American businesses to take equity positions in suppliers and firms with promising technology. "Learning from Japan," *Business Week* (Jan. 27, 1992). In the first half of the 1980's, many large companies turned to acquisitions as a less expensive alternative to building from within and in some cases to achieve countercyclicality. In 1984 alone, "2543 deals were struck" for a total of $122 billion. Prokesch and Powell, "Do Mergers Really Work?" *Business Week* (June 3, 1985). To take a single example, Dupont acquired Conoco, Inc. purportedly as a source of feedstocks. "DuPont/Conoco – Making

the Marriage Work," *Chemical Week* (Sept. 2, 1981); Samuelson, "Merger Mania," 13 *National Journal* 2126 (Nov. 28, 1981). But with the acquisition of Conoco came Consolidation Coal, the second-largest U.S. coal producer, the acquisition of a 20% interest in DuPont by Seagram, and uncertainty as to DuPont's commitment to its stated strategy of building up its health care, pharmaceuticals, and related businesses. Characterizing the post-merger company, DuPont's chairman was reported to have stated: "What we are is a broadly diversified company. . . . We're not an oil company, obviously, nor are we a purely chemical company." "DuPont/Conoco . . . ", *supra*.

The accounting literature reflects a similar ambiguity in classifying investing activities and operating activities. The Financial Accounting Standards Board ("FASB") has defined investing activities for purposes of the cash flow statement as:

> making and collecting loans and acquiring and disposing of debt or equity instruments and property, plant, and equipment and other productive assets, that is, assets held for or used in the production of goods or services by the enterprise (other than materials that are part of the enterprise's inventory). ["Statement of Cash Flows," *Statement of Financial Accounting Standards No.* 95, § 15 (FASB, Nov. 1987)].

Operating activities were defined as any activity other than investing or financing activities. *Id.* at § 21. The FASB has recognized that certain cash receipts and cash payments may have aspects of more than one class of cash flow, in which case the appropriate classification

depends upon the activity that is likely to be the predominant source of the cash flow. *Id.* at § 24, and *see Statement of Financial Accounting Standards No.* 102, § 25 (FASB, Feb. 1989).[30]

To require state taxing authorities and courts to draw a constitutional line between operational and passive investments when the marketplace does not is unreasonable. The facts and records regarding corporate investing are within the taxpayer's control. The distinction between operational and passive investments has proved elusive and subject to manipulation in the federal income tax context, specifically the *Corn Products*[31] exception to the statutory definition of capital asset. *See W.W. Windle Co. v. Commn'r of Internal Revenue,* 65 T.C. 694, 712-13 (1976), *appeal dismissed* 550 F.2d 43 (1st Cir. 1977), *cert. denied* 431 U.S. 966 (1977) (requiring capital asset classification where taxpayer had mixed investment and business motives and alluding to opportunity for claiming ordinary losses on unprofitable investments and capital gains

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[30] There is a similar gray area in determining when an investment may be reported on the equity method of accounting. Accounting Principles Board Opinion No. 18 provides that the equity method must be used if an investor in common stocks has the ability to exercise significant influence over the issuer, that significant influence will be presumed with an equity interest of 20% or more, but that the presumption may be overcome by predominant evidence to the contrary. *Accounting Standards: General Standards Current Report,* § 182.104, FASB June 1990. The FASB has been reviewing the 20% dividing line to determine whether it should be changed. *FASB Status Report,* 3-4 (Oct. 11, 1988).

[31] *Corn Products Refining Co. v. Comm'r,* 350 *U.S.* 46 (1955).

on profitable ones); *Union Pacific R.R. Co., Inc. v. United States*, 524 F.2d 1343, 1359 (Ct. Cl. 1975) (stocks in subsidiaries were not capital assets because their acquisition "was accomplished for an operating, business purpose and the stock was held as part of the operation of plaintiff's business . . . "). In *Arkansas Best Corp.*, the Court eliminated the business-motive test as an exception to *IRC* § 1221, pointing out the potential for abuse and the whipsaw effect of the doctrine. *Id.* at 222-23. Our proposed rule of full apportionment would have a similar beneficial impact in the state tax context.[32]

A final advantage of the proposed rule is that the in-state tax base would be determined exclusively by the apportionment factor, which is what the factor is designed to do. In appropriate cases, the factor can be adjusted to reflect the proper amount of income attributable to a state. *See, e.g., N.J.S.A.* 54:10A-8. The adjustments can be tuned to particular factual circumstances. The unitary business principle, on the other hand, when applied to single corporations produces extreme, unrealistic results – large amounts of income are either in or out of the tax base according to tenuous, artificial distinctions.

[32] Bendix reported the ASARCO investment on the equity method (J.A. 168, ¶ 55) thereby indicating to the public that it had the ability to exercise significant influence over ASARCO. When it came to the company's New Jersey tax liability, the Bendix CEO testified that he and the other Bendix director who sat on ASARCO's board had virtually no influence on the board (J.A. 85; and *see* J.A. 168, ¶ 54; J.A. 169, ¶ 62).

CONCLUSION

For the foregoing reasons and those set forth in New Jersey's initial brief, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

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NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE TAX COURT
COMMITTEE ON OPINIONS
TAX COURT OF NEW JERSEY

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Re: American Trucking Association, v. Robert Kline, *et al*
Docket No. 07-14-1667-85MVT

Counsel:

This letter constitutes the opinion of the court in the above matter. Plaintiffs, American Trucking Association, Inc., Bee Line Motor Freight, Inc., Moss Trucking Company, Inc. and C.P. Belue, Sr., on behalf of themselves and others similarly situated, have challenged the New Jersey $25 truck identification marker fee (decal fee).[1] *N.J.S.A.* 54:39-10. This court has previously certified a class of motor carriers having their principal places of business in states other than New Jersey, and denied plaintiffs' application for the creation of an escrow fund into which the decal fees in contest would be deposited.

Plaintiffs seek refund of decal fees paid by plaintiff class from July 10, 1984 through August 18, 1987. On April 25, 1986, consistent with this court's opinion of February 19, 1986 (reported at 8 *N.J. Tax* 181 (Tax Ct. 1986)) and Order of March 25, 1986, plaintiffs filed a single refund claim on behalf of the plaintiff class, claiming refunds dating back to July 10, 1984. On or about September 28, 1987, the plaintiff class filed a second refund claim covering the period subsequent to the period covered by the first refund claim.

On June 23, 1987, the United States Supreme Court ruled that Pennsylvania's $25 axle tax, a flat tax, discriminated against interstate commerce, bearing more heavily on a cost-per-mile basis on out-of-state trucks. *American*

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[1] Although referred to as a fee, this imposition is actually a tax. *American Trucking Ass'n v. Kline*, 8 *N.J. Tax* 181, 184 (Tax Ct. 1986). *See also Bellington v. East Windsor*, 17 *N.J.* 558, 564 (1955).

Trucking Ass'ns, Inc. v. Scheiner, 483 *U.S.* ___, 104 *S.Ct.* 28-29, 97 *L.Ed.* 2d 226 (1987).

On August 18, 1987, following *Scheiner,* the State conceded that New Jersey's decal fee violates the Commerce Clause under *Scheiner,* but reserved the right to argue that (1) the $25 fee is constitutional to the extent that it covers the State's actual cost of issuing decals and (2) the $10 temporary permit fee is constitutional under *Scheiner*. The State also contends that the decal fee should be deemed unconstitutional only prospectively from June 24, 1987. On August 19, 1987, the State ceased collecting the decal fee.

Plaintiff American Trucking Association, Inc. ("ATA") is a non-profit corporation incorporated under the laws of the District of Columbia. ATA is a trade association of motor carriers, state trucking associations and national trucking conferences. A substantial number of ATA's members are subject to and affected by the increased $25 per truck identification marker fee.

Plaintiff Bee Line Motor Freight, Inc. ("Bee Line"), a Nebraska corporation, is an interstate motor common carrier, as defined in the Interstate Commerce Act. During the 1984 fiscal year of the New Jersey motor fuels use tax, Bee Line purchased 45 decals and thus qualified 45 of its motor carrier vehicles for operation into and through the State of New Jersey. During 1984, all of Bee Line's motor carrier vehicles were registered in Nebraska.

Plaintiff Moss Trucking Company, Inc. ("Moss"), a North Carolina corporation, is an interstate motor common carrier as defined in the Interstate Commerce Act. During the 1984 fiscal year of the New Jersey motor fuels

use tax, Moss purchased 193 decals, qualifying 193 of its motor carrier vehicles for operation into and through the State of New Jersey. During 1984, most of Moss's motor carrier vehicles were registered in North Carolina, but some were registered in Virginia and Delaware.

Plaintiff C.P. Belue, Sr., doing business as Belue Trucking ("Belue"), is a sole proprietorship, with his principal place of business in Campobello, South Carolina. During the 1984 fiscal year of the New Jersey motor fuels use tax, Belue purchased 23 decals, qualifying 23 of his motor carrier vehicles for operation into and through the State of New Jersey. During 1984, most of Belue's motor carrier vehicles were registered in South Carolina.

The class, as certified by the court and represented by the above-named plaintiffs, is all interstate motor carriers whose principal places of business are located outside the State of New Jersey and who were subject to the requirements and liable for payment of the decal fee during the period July 10, 1984 through August 18, 1987.

Plaintiffs allege that Bee Line, Moss and Belue have been assessed and have paid all applicable fees and taxes called for under the laws of the State of New Jersey including the decal fee.

Pursuant to *R.* 4:33-1, a motion to intervene, on behalf of Owner-Operators Independent Drivers Association of America, Inc. ("OOIDA"), Robert J. Heinsohn, Betty J. Colvin, George A.Tibbetts and John T. Overstreet, was granted.

OOIDA is a non-profit organization incorporated under the laws of the State of Missouri, with its principal

office in Oak Grove, Missouri. OOIDA is a national trade association representing owner-operators, with an active membership of nearly 8,000 owner-operators from all states, except Hawaii. Robert J. Heinsohn, Betty J. Colvin, George A. Tibbets and John T. Overstreet are owner-operators who have paid the New Jersey decal fee.

The defendants in this action are the New Jersey state officials empowered by law to administer and enforce the challenged legislation. While the identity of certain of the officials may have changed over time, the responsibilities of the offices remain the same.

The motor fuels use tax statutory scheme requires that motor carriers operating vehicles within New Jersey annually register each vehicle and receive from the Director of the Division of Motor Vehicles identification markers to be displayed on each vehicle. *N.J.S.A.* 54:39A-10 imposes a flat fee for each marker issued.

The identification marker (decal) issued is affixed to the cab of each truck that is subject to the Motor Fuels Use Tax Act, *N.J.S.A.* 54:39A-1 *et seq.*, and evidences compliance with that act. The decal fee provides a source of revenue for the Transportation Trust Fund and covers the cost to the Bureau of Motor Carriers of issuing decals. The total cost of issuing decals is approximately $500,000 per year, or approximately $1 per vehicle. A decal is valid for the period April 1 through March 31 of the succeeding calendar year. If a carrier makes no more than six trips through the State within a calendar year, it may be issued single-trip permits valid for 96 hours, at a cost of $10 each, instead of the $25 decal. Payment of this fee is in

lieu of motor fuels use tax payments and reporting requirements.

When originally enacted in 1963, the decal fee was $2. From 1964 to 1979, the fee was $3 per motor vehicle. In 1979, the fee was increased to $6 per motor vehicle. A 1984 amendment to *N.J.S.A.* 54:39A-10 increased the annual decal fee from $6 to $25. The amendment took effect on passage on July 10, 1984, but because decals are valid from April through the following March 31, the increased fee was not collected by the State until the existing decals were required to be renewed for the motor fuels use tax year April 1, 1985 through March 31, 1986.

Total decal fee collections for the period July 10, 1984 through August 18, 1987 amounted to $41,145,543. Collections from out-of-state carriers accounted for 83-84% of total decals issued. Therefore, the total refund sought by plaintiffs is between $34,150,801 and $34,562,256. The State concedes that plaintiffs are entitled to a refund of $462,185–(before deducting the $1 per decal administrative cost), 84% of the fees paid from June 24, 1987 (the day after *Scheiner* was decided) through August 18, 1987 (the last day the State collected the fee).

Plaintiffs contend that: (1) the stipulation entered into by the parties on February 27, 1985 requires the State to refund illegally-collected taxes should the decal tax be declared unconstitutional, (2) the general rule of presumptive retroactivity of judicial decisions applies in this case because the *Scheiner* case was a logical and predictable application of the anti-discrimination principles announced in *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* 274 (1977), and retroactive application will not give rise

to inequitable results that would justify refusing refunds, (3) the State is not entitled to retain $1 of each decal fee as the cost of issuing the decal because the $25 decal fee is a discriminatory flat tax, and because the court cannot rewrite the tax provisions of the motor fuels use tax to create an administrative fee in lieu of a tax, (4) plaintiffs are entitled to interest on their refund, (5) class counsel are entitled to attorneys' fees, and (6) the court should authorize an appropriate distribution plan.

I

We first address the issue of whether the determination of unconstitutionality of the decal fee should be applied prospectively or retroactively. Is an unconstitutional statute a nullity from the moment of its adoption, or is the declaration of unconstitutionality effective only from the date of that determination? Prior law held in favor of the former notion. *Norton v. Shelton County*, 118 *U.S.* 425, 442, 30 *L.Ed* 178 (1886). However, in view of the harsh results that may occur when all past transactions made in reliance on a presumedly valid statute are invalidated, more recent decisions have held that, in each case, there must be a balancing of the constitutional requirements. The parameters of the analysis for this balancing are found in *Chevron Oil Company v. Huson*, 404 *U.S.* 97, 106, 92 *S.Ct.* 349, 355 (1971). Three factors were identified in that case to justify non-retroactivity:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution

> was not clearly foreshadowed. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' 404 *U.S.* at 106-107, [citations omitted].

The *Chevron* case was followed by *Lemon v. Kurtzman*, 411 *U.S.* 492, 93 *S.Ct.* 1463 (1973). In the first *Lemon* case, 403 *U.S.* 602, 91 *S.Ct.* 2105, 29 *L.Ed.*2d 745 (1971), the state statute which permitted state payments to private and parochial schools had been found to be unconstitutional as violative of the First Amendment. The issue before the court in the second *Lemon* case (411 *U.S.* 492) was whether the decision in the first *Lemon* case should be applied retroactively, which would require the private and parochial schools to refund the monies unconstitutionally disbursed by the State, or applied prospectively only. The Court's decision was shaped in large part by consideration of the three factors discussed in *Chevron*.

In 1983 the New Jersey Supreme Court dealt with the prospectivity issue in the context of a state tax in *Salorio v. Glaser*, 93 *N.J.* 447, cert. den. 464 *U.S.* 993, 78 *L.Ed.* 2d 683 (1983). The Supreme Court, in holding the Emergency Transportation Tax Act (ETT) unconstitutional, applied its decision prospectively, permitting a six-month grace

period in which the State could continue to collect the tax. This holding was grounded in the State's "justifiable reliance upon the availability of the ETT funds," (93 *N.J.* at 465), the period of time that the taxing statute had been in effect (1961 to 1983), and the lack of financial harm to the New York residents who paid the tax and received a credit against their New York personal income tax in the same amount.

I deal first with the question of whether the invalidity of the decal fee is the result of a new principle of law, either overruling clear past precedent on which litigants may have relied or deciding an issue of first impression whose resolution was not clearly foreshadowed.

The nullification of the subject decal fee occurred as a direct result of the decision of the United States Supreme Court in *Scheiner, supra*. In that case, the Court was called upon to review two Pennsylvania statutes which imposed lump sum annual taxes on trucks, a $25 "marker fee" and an "axletax." These taxes were "flat taxes." The Court begins its opinion by stating that it is again asked to decide whether state taxes, as applied to an interstate motor carrier, violate the Commerce Clause. The Court says, "[t]hat statement of the question presented might equally well have introduced the Court's opinion in either *Spector Motor Service, Inc. v. O'Connor*, 340 *U.S.* 602, 71 *S.Ct.* 508, 95 *L.Ed* 573 (1951), or *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* 274, 97 *S.Ct.* 1076, 51 *L.Ed.* 2d 326 (1977), which overruled *Spector.*" *Scheiner, supra*, 107 *S.Ct.* at 2832. The specific issue before the Court was:

> Do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause? We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a state from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among states. 107 *S.Ct.* at 2839.

The *Scheiner Court* analyzed the subject taxes in terms of the *Complete Auto* test, reasoning that unapportioned flat taxes penalize interstate travel. In arriving at this conclusion, it considered an "internal consistency" test – the effect on commerce if many states imposed flat taxes, and the threat to national free trade that this action would have. They also examined the subject taxes and held "in practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." The Court stated that "[u]nder our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause." 107 *S.Ct.* at 2841 [citation omitted].

The State contends that *Scheiner* establishes a new principle of law because flat taxes had been held to be constitutional in *Capital Greyhound Lines v. Brice*, 339 *U.S.* 542, 70 *S.Ct.* 806, 94 *L.Ed* 1053 (1950); *Aero Mayflower Transit Corp. v. Board of Railroad Comm'rs*, 332 *U.S.* 495, 68 *S.Ct.* 167, 92 *L.Ed* 99 (1947), and *Aero Mayflower Transit Co.*

v. Georgia Public Service Comm'n, 295 *U.S.* 285, 55 *S.Ct.* 709, 79 *L.Ed* 1439 (1935). The flat taxes in these three cases, decided between 1935 and 1950, were upheld on the ground that they were taxes on the privilege of using the State's highways, not on the privilege of engaging in interstate commerce. The *Scheiner* Court stated that "the distinction between a tax on the privilege of using a State's highways and a tax on the privilege of engaging in interstate commerce was also dispositive in *Spector Motor Service, Inc. v O'Connor*, 340 *U.S.* 602, 71 *S.Ct.* 508, 95 *L.Ed* 573 (1951). . . . " *Scheiner* at 107 *S.Ct.* 2846.

The *Scheiner* Court stated:

> In our more recent decisions we have rejected this somewhat metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax. In 1977, while we recognized that we had invalidated privilege taxes on in-state activity deemed to be part of interstate commerce, we also noted that we had 'moved toward a standard of permissibility of state taxation based upon its actual effect rather than its legal terminology'. *Complete Auto Transit, Inc. v. Brady*, 430 *U.S.* at 281, 97 *S.Ct.* at 1080. 107 *S.Ct.* at 2846.

The *Scheiner* Court stated further that *Complete Auto Transit* had overruled *Spector* and had rejected the concept that interstate commerce is immune from state taxation. The Court stated:

> In ruling that the theoretical underpinnings of this rule had been eroded, we necessarily called into question the future vitality of earlier cases that had upheld facially neutral flat taxes

against challenges premised on the rule of immunity for interstate commerce. Unsuccessful challenges had then been turned away on the theory that the State was not taxing the conduct of interstate commerce but instead was taxing a unitary, formally defined privilege that was sometimes part of intrastate commerce and sometimes part of interstate commerce. Now that it has been firmly established that interstate commerce as such has no immunity from state taxation, it is no longer appropriate to uphold a flat tax merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state activities. Such formalism 'merely obscures the question whether the tax produces a forbidden effect.' 107 *S.Ct.* at 2846.

Even if *Complete Auto Transit* did not specifically overrule the *Greyhound* and *Aero Mayflower* cases of 1935, 1947 and 1950, as Justice O'Connor indicates in her dissent, in which the Chief Justice and Justice Powell joined, the invalidity of flat taxes which discriminate as a matter of practical effect was clearly foreshadowed by *Complete Auto Transit*.

Justice O'Connor, referring to the *Greyhound* and *Aero Mayflower* cases, states: "These cases were apparently cited with approval as recently as *Massachusetts v. United States*, 435 *U.S.* 444, 463-464, 98 *S.Ct.* 1153, 1165-1166, 55 *L.Ed*2d 403 (1978), and *Evansville-Vanderburgh Airport Authority District v. Delta Air Lines, Inc.*, 405 *U.S.* 707, 715-717, 92 *S.Ct.* 1349, 1354-1355, 31 *L.Ed.*2d 620 (1972)." However, defendants' reliance on *Massachusetts* or *Evansville-Vanderburgh* for the broad proposition that they

explicitly validated flat taxes after the United States Supreme Court decision in *Complete Auto* is misplaced.

The issue in *Massachusetts* was not whether a state tax unduly burdens interstate commerce, as in *Complete Auto Transit*, but whether a federal annual registration tax on civil aircraft that fly in the air space of the United States violates the state's immunity from federal taxation. In *Massachusetts*, the United State Supreme Court stated explicitly that flat taxes will be sustained against claims based on the Commerce Clause so long as such taxes "(1) do not discriminate against interstate commerce, (2) are based on some fair approximation of use, and (3) are not shown to be excessive, in relation to the cost of the benefits conferred." *Massachusetts, supra*, 98 *S.Ct.* at 1166.

The flat tax imposed by the federal government as part of the comprehensive program to recoup the cost of federal aviation programs was found to be non-discriminatory. The Supreme Court applied the three-prong test of *Evansville-Vanderburgh*, but substituted "state function" for "interstate commerce" and said a state can have no objection to a federal revenue measure "[s]o long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the federal government of the benefits to be supplied." 98 *S.Ct.* at 1167. Thus, the Supreme Court's analysis of a flat tax in *Massachusetts* was entirely consistent with the principles articulated in *Complete Auto Transit*.

Evansville-Vanderburgh was decided in 1972, prior to *Complete Auto Transit*. *Evansville-Vanderburgh* held constitutional a $1 use and service charge for each deplaning passenger, on the ground that the fee did not discriminate against interstate commerce.

Defendant asserts that, prior to *Scheiner*, no Supreme Court precedent suggested that a facially non-discriminatory tax would have to pass the "internal consistency" test. Under this test, the tax must be of a kind that, if applied by every jurisdiction, would not result in impermissible interference with free trade. However, the "internal consistency" test is but one way of analyzing the practical effects of the state tax. It would make no sense for the Court to apply the internal consistency test in the *Massachusetts* case because it involved a federal tax, which is applied to all 50 states. However, the decision in *Massachusetts* was based on consideration of the practical effect of the tax, and was held to be non-discriminatory. That Court stated: "the present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives." 98 *S.Ct.* at 1167. It cannot be said that the application of the "internal consistency" test in *Scheiner* represented a new principle of law which was not foreshadowed by prior decisions. Rather, it was a specific application of principles articulated by the Supreme Court in *Complete Auto* and the cases that followed it.

Defendant's assertion that the New Jersey Legislature acted in reliance on the *Greyhound* and *Aero Mayflower* cases must be viewed in light of the Legislature's Joint Resolution, which condemned the Pennsylvania axle tax because it caused "great hardship for trucks registered in New Jersey and was 'highly inequitable' inasmuch as the

burden falls upon truck owners who are not resident in Pennsylvania." *Joint Resolution No. 10,* approved and effective June 29, 1983. The Resolution asked Governor Kean to request the Governor and Legislature of Pennsylvania to reconsider the axle tax, with a view to its suspension or repeal.

In summary, it is apparent that in 1984 the Legislature was not justified in relying on the *Greyhound* and *Aero Mayflower* cases, decided between 1935 and 1950, to permit enactment of a discriminatory flat tax. A distinction may be made between discriminatory and non-discriminatory flat taxes. These three cases upheld discriminatory flat taxes on the ground that those taxes were imposed not on interstate commerce but on the privilege of using the roads of the state. In 1977, *Complete Auto Transit* made it clear that a state could tax interstate commerce but could not discriminate against interstate commerce. *Evansville-Vanderburgh,* decided before *Complete Auto Transit,* and *Massachusetts,* decided after *Complete Auto Transit,* did not validate discriminatory flat taxes. They upheld flat taxes which they determined were not discriminatory. It is clear that the contention that the State relied on existing law in 1984 to justify a tax which obviously discriminated against interstate commerce is misplaced.

I find that the decision of the United States Supreme Court in *Scheiner,* which invalidated a flat tax, was, at the very least, clearly foreshadowed by *Complete Auto Transit.*

I next turn to the history of the decal fee, its purpose and effect. Although the decal fee has been a part of our motor-carrier taxing scheme since 1963, it was not until

1984 that the fee was substantially increased to an amount which, at that time, was the highest in the nation. When the decal fee was increased in 1984, plaintiffs promptly instituted an action contesting it. The $25 decal fee thus did not have the longevity of the ETT, nor can we say, as the Court did in *Salorio*, that the taxpayers suffered no financial harm.

I find that the anti-discrimination principles of the Commerce Clause will be furthered and not retarded by retroactive application of the determination of unconstitutionality of the decal fee. I find, in part, that such action is appropriate because its effect will be to discourage further enactment of constitutionally invalid transportation-related taxes.[2] It is often difficult for interstate business to contest State taxes on Commerce Clause grounds. When such challenges are made successfully but refunds are denied, legislatures are emboldened to enact taxes that favor local interests at the expense of out-of-state interests, and legitimate challenges are discouraged.

With respect to equitable aspects, the State contends that there is no measurable economic harm to the plaintiffs because the decal fee is small compared to other costs of operating over the highways of New Jersey, and because its cost is passed on to the consumer. Plaintiffs and defendant each submitted reports of economist experts who opined on the "pass on" of decal fees to

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[2] *See Private Truck Council v. State*, 111 *N.J.* 214 (1988); *Continental Trailways v. Director, Div. of Motor Vehicles*, 102 *N.J.* 526 (1986), and *Salorio v. Glaser, supra*, as examples of transportation-related taxes which have been held to violate constitutional requirements.

consumers. From the evidence submitted by these two economists, I am unable to conclude that, under the prevailing market conditions, motor carriers and owner-operators are able to completely or even substantially shift the incidence of the New Jersey decal fee forward to their customers. Trucking competes in the general freight transportation market with other transportation modes (rail, air and water) which are not subject to the decal fee. Therefore, truckers cannot unilaterally raise prices without losing business to their non-taxed competitors. Even if trucking operated in an exclusive market, the supply of trucking services in relation to demand would not decrease sufficiently in response to the decal fee to allow a shift of the decal fee to customers. During the period 1984-1987, deregulation of the trucking industry caused an increase in competition because a substantial number of new carriers entered the market. This increased competition also acted to prevent a pass on of the decal fee. Motor carriers are not flexible enough to cease serving customers in or cease driving through New Jersey in response to the relatively small decal fee in relation to other costs.

For these reasons, it is likely that there was no substantial pass-on of the decal fee to customers, and any shift to consumers is impossible to quantify. Therefore, I cannot conclude that plaintiffs will receive a windfall if a refund is granted. As between the State, which enacted a tax which was unconstitutional, and the taxpayers who were forced to pay this tax, the latter have the superior equitable claim.

I find, therefore, under the principles of the *Chevron v. Huson* case, that the decision in *Scheiner* did not

constitute "a clear break" with past law, that legislators will be dissuaded from enacting legislation which discriminates against interstate commerce by the granting of a refund in this case, and that equitable considerations require that the determination of invalidity of the decal fee be applied retroactively, not prospectively.

I also note that this is consistent with the remedy granted by the Appellate Division in *Private Truck Council v. State,* 221 *N.J. Super.* 89 (App. Div. 1987), aff'd 111 *N.J.* 214 (1988), where a refund was ordered, and is consistent with and ameliorative of the agreement entered into between plaintiffs and the State at the inception of this litigation, where the taxpayers gave up their right to seek a preliminary injunction in exchange for "the State having determined that the volunteer principle should not be invoked and that a remedy to recover the fees should be applicable to the extent that all or any portion of such fees are declared to be invalid." In their stipulation, the parties agreed that "should plaintiffs ultimately prevail on the merits in this action, one of the remedies for the recovery of taxes or fees improperly collected will be applicable and may be invoked by the plaintiffs." This court had previously denied plaintiffs' motion to be permitted to pay taxes to an escrow fund to assure the availability of funds for, and the right to receive, refunds should the statute be declared unconstitutional. The court denied that motion, permitting the filing of a refund claim on behalf of the class and stating that that remedy was a sufficient substitute for the escrow fund.

II

The State asks that if a refund of the decal fee is granted to plaintiffs, the refund be limited to $24, with $1 of the fee to be retained by the State to cover the cost of administration. This would require the court to rewrite the statute to provide that the unconstitutional decal fee is $24 in amount and that there is, in addition, a $1 administrative fee which may be constitutional. I find it inappropriate, under the circumstances, for this court to rewrite the statute. I find it proper for a trial court to follow the dictates of the Supreme Court and refrain from judicial restructuring of legislation because policy considerations should, in the first instance, be dealt with by the Legislature rather than the court. *New Jersey Chamber of Commerce v. Election Law Enforcement Comm.*, 82 *N.J.* 57, 81 (1980); *State v. Rosenfeld*, 62 *N.J.* 594, 602 (1973). I note that in the year which has elapsed since *Scheiner*, the Legislature has not enacted a substitute decal fee based on the cost of administration.

III

Are plaintiffs entitled to interest
or :heir refunds?

There is no statutory authorization for payment of interest by the State on tax refunds. I therefore reject plaintiffs' contention that interest should be paid on the refunds. This determination will not preclude plaintiffs from contending that, as a part of the distribution plan, a separate interest-bearing fund should be established, from which the refunds will be paid.

IV

Plaintiffs do not contest the $10 temporary permit fee and have submitted no evidence that it is discriminatory. The $10 temporary permit fee is not only a fee for a decal but is in lieu of motor fuels tax. Since there is no issue with respect to this fee, the court makes no decision as to it.[3]

V

The matter of the awarding of counsel fees will be held pending the filing of a detailed attorney fee petition.

VI

A conference will be held with counsel for the purpose of discussing the mechanics of a distribution plan on September 29, 1988 at 2:00 p.m. in the Tax Court Courtroom, Hughes Justice Complex, 7th Floor, Court Wing, Market Street, Trenton, New Jersey.

Plaintiffs' counsel will submit an appropriate order with respect to all of the foregoing.

Very truly yours,

/s/ Lawrence L. Lasser
Lawrence L. Lasser,
P.J.T.C.

LLL:bjd

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[3] I do not regard footnote no. 9 on page 30 of OOIDA's brief as sufficient to raise a constitutional question regarding the $10 temporary permit fee or to establish its invalidity.

CAPITAL GAINS CASES	TAX YEARS	DOUBLE
Pre-*ASARCO*		
Atlantic Richfield Co. v. Colorado Department of Revenue, 198 *Col.* 413, 601 *P.*2d 628 (1979)	1969-73	No
W.R. Grace & Co. v. Commissioner of Revenue, 378 *Mass.* 577, 393 *N.E.*2d 330 (1979)	1969	Court reje argument, multiple t for invalid reasonable reasonably
Post-*ASARCO*		
James v. International Telephone & Telegraph Corp. 654 *S.W.*2d 865 (Mo. banc 1983)	1972-73	No
Brunner Enterprises v. Department of Revenue, 452 *So.*2d 550 (Fla. 1984)	1973-74	No
M. Lowenstein Corp. v. South Carolina Tax Comm'n, 298 *S.C.* 93, 378 *S.E.*2d 272 (App. 1989)	1978-81	No
Pledger v. Illinois Tool Works Inc., 306 *Ark.* 134, 812 *S.W.*2d 101 (Ark. 1991) *cert. denied* 112 *S.Ct.* 418 (1991)	1981-83	No
Corning Glass Works, Inc. v. Virginia Dep't of Taxation, 241 *Va.* 353, 402 *S.E.*2d 35 (Va. 1991) *cert. denied* 112 *S.Ct.* 277 (1991)	1983-84	No

AXATION ALLEGED?	HOLDINGS
	Capital gains and interest income received on sale of corporate assets is apportionable income.
ted taxpayer's double taxation " 'speculative concerns with xation' provide insufficient basis ting a tax derived from a apportionment formula applied." *Id.* at 337.	Capital gains income from sale of subsidiary's stock is apportionable income.
	Capital gains income from divestiture of subsidiaries pursuant to a consent decree is not apportionable income.
	After *ASARCO* opinion, court reversed its previous ruling and held that capital gain from an out-of-state sale of bank stock is not apportionable income.
	Capital gains income from repurchase of bonds and interest from the loans are apportionable income.
	Capital gains income from six different capital assets is not apportionable income.
	Capital gains from divestiture of corporate affiliate and interest income are not apportionable income.

Super Valu Stores v. Iowa Dep't of Revenue and Finance, 479 *N.W.*2d 255 (Iowa 1991)	1984	No

DIVIDEND INCOME CASES	TAX YEARS	DOUBLE TA
Post-*ASARCO*		
Philip Morris Inc. v. Director of Revenue, 760 *S.W.*2d 888 (Mo. banc. 1988)	1980-82	No
Jewel Companies, Inc. v. Montana, Dept. of Revenue, No. CT-1985-4 (81 Mont. Tax LEXIS 1990), remanded Montana First Judicial District Court No. BDV-89-294 (Oct. 31, 1991)	1979-83	No
NCR Corp. v. South Carolina, 402 *S.E.*2d 666 (S.C. 1991)	1981-83	No

INTEREST INCOME CASES	TAX YEARS	DOUBLE TA
Pre-*ASARCO*		
Great Lakes Pipe Line Co. v. Commission of Taxation, 272 *Minn.* 403, 138 *N.W.*2d 612, app. dismissed 384 *U.S.* 718 (1965)	1955-59	Yes, Court r argument, " same prope longer a co
Montgomery Ward & Co. v. Commissioner of Taxation, 276 *Minn.* 479, 151 *N.W.*2d 294 (Minn. 1967)	1955-58	No

Capital gain income is apportionable income.

XATION ALLEGED?

HOLDINGS

Dividend income is not apportionable business income.

State Tax Appeal Board (STAB) held that dividends and capital gains income are apportionable business income. First Judicial District Court remanded case to STAB to evaluate case under proper legal standards as set forth in *ASARCO, Woolworth* and *Container.*

Income payments from licensees and subsidiaries is apportionable business income.

XATION ALLEGED?

HOLDINGS

jected double taxation ossibility of taxation of the y by more than one state is no stitutional objection." *Id.* at 619.

Interest income from short term government obligations and commercial paper is apportionable business income.

Interest income from short term investments is apportionable business income.

INTEREST INCOME CASES	TAX YEARS	DOUBLE T
Champion International Corp. v. Bureau of Revenue, 88 *N.M.*411, 540 *P.*2d 1300 (1975)	1972	No
Qualls v. Montgomery Ward & Co., 266 *Ark.* 207, 585 *S.W.*2d 18 (1979) [overruled by *Pledger v. Illinois Toolworks,* 812 *S.W.*2d 101 (1991)]	1972-74	Yes, court r argument, " nor the con precision in
Post-*ASARCO*		
Lone Star Steel Co. v. Dolan, 668 *P.*2d 916 (Colo. *en banc* 1983)	1970-73	Yes, court r argument, t burden of s a fair appor
Comptroller v. Armco, Inc., 70 *Md. App.* 403, 521 *A.*2d 785 (Md. App. 1987)	1978	No
NCR Corp. v. Comptroller of the Treasury, 313 *Md.* 118, 544 *A.*2d 764 (Md. 1988)	1976-77	No
NCR Corp. v. Comm'r of Revenue, 438 *N.W.*2d 86 (Minn. 1989), *cert. denied* 493 *U.S.* 845 (1990)	1977-81	Yes, court re possible dou taxes subsid countries ta constitution state to appl because the

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XATION ALLEGED?	HOLDINGS
	Interest income from the short-term investment of excess capital is apportionable business income.
ected double taxation neither the due process clause merce clause requires total multi-state taxation." *Id.* at 31.	Interest income from loans to out-of-state corporate affiliates is apportionable business income.
ected double taxation xpayer has not satisfied its owing that there has not been ionment. *Id.* at 927.	Interest income from short term loans and dividends received from subsidiaries are apportionable income.
	Court of Special Appeals remanded case to tax court for a finding of whether Armco's business activity in generating a loan to an unrelated corporation is unitary with Armco's business in Maryland.
	Interest income from investments of surplus funds in short term certificates of deposit, commercial paper, government notes and municipal bonds is apportionable income.
ected taxpayer's argument that ble taxation exists if Minnesota aries' income and foreign the same income because analysis does not require the a different formula simply isk may be lower. *Id.* at 94.	Interest income payments from licensees and subsidiaries is apportionable income.

INTEREST INCOME CASES	TAX YEARS	DOUBLE
American Home Products Corp. v. Limbach, 49 *Ohio St.* 3d. 158, 551 *N.E.*2d 201, *cert. denied* 111 *S.Ct.* 63 (1990)	1980-83	No
Williams Companies v. Director of Revenue, 799 *S.W.*2d 602 (Mo. 1990) *cert. denied* 111 *S.Ct.* 2916 (1991)	1982-84	No

NEW JERSEY CASES	TAX YEARS	TAX AMO
Pre-*ASARCO*		
F.W. Woolworth v. Director, Division of Taxation, 45 *N.J.* 466, 213 *A.*2d 1 (1965)	1959	$100,000
Post-*ASARCO*		
Silent Hoist & Crane v. Director, Division of Taxation, 100 *N.J.* 1, 494 *A.*2d 775 (1985), *cert. denied* 474 *U.S.* 995 (1985)	1971-74	$49,341
International Paper Co. v. Director, Division of Taxation, 11 *N.J. Tax* 147 (Tax Ct. 1990 *en banc*) aff'd N.J. Super. Ct. App. Div., No. A-5138-89T5 (May 13, 1991), certif. denied N.J. Sup. Ct., No. 33,784 (Oct. 16, 1991)	1981-82	Refund Cla

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AXATION ALLEGED?

HOLDINGS

Interest income from short-term investment securities is not apportionable income when not used in the business.

Interest income on inter-corporate loans and capital gains from preferred stock are apportionable income.

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HOLDINGS

Value of foreign subsidiaries is includable in the net worth tax base and the income from foreign subsidiaries is includable in the net income tax base.

Portfolio investment income is apportionable income.

n of $159,526

Capital gain and interest income from sale of wholly owned subsidiary is apportionable income. Capital gain income realized on sale of minority stock interest is not apportionable income.

NEW JERSEY CASES	TAX YEARS	TAX AMOU
Mobil Oil Corp. v. Director, Division of Taxation, 11 *N.J. Tax* 344 (Tax Ct. 1990), aff'd *per curiam*, N.J. Super. Ct., No. A-2326-90T5 (March 4, 1992)	1980	$3,686,582
American Home Products Corp. v. Director, Div. of Taxation, 11 *N.J. Tax* 287 (Tax Ct. 1990) appeal pending N.J. Super Ct., A-4316-90T3	1979-81	$415,873
Bendix Corp. v. Director, Division of Taxation, 10 *N.J. Tax* 46 (Tax Ct. 1988) aff'd 237 *N.J. Super.* 328, 568 *A.*2d 59 (App. Div. 1989), 125 *N.J.* 20, 592 *A.*2d 536 (1991), *cert. granted sub nom. Allied Signal, Inc. v. Director, Division of Taxation*, 112 *S.Ct.* 632 (1991)	1981	Refund Clai

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HOLDINGS

Capital gain income from 17% interest in oil producing company is not apportionable income.

Interest income from short term investment of working capital is apportionable only to extent that income and underlying investments were used in taxpayer's business; income from diversified, minority stock investments is not apportionable income.

of $2,056,645

Capital gains from 20% stock investment and from wholly owned subsidiary and related interest income are apportionable income.